TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1115.

THE TOWN OF SEVEN HICKORY, PLAINTIFF IN ERROR,

vs.

GEORGE B. ELLERY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 26, 1880.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court, before you, between George B. Ellery and the Town of Seven Hickory, a manifest error hath happened, to the great damage of the said Town of Seven Hickory, as by its complaint appears: We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held;

b that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at Springfield, in said district, this 17th day of August, in the year of our Lord eighteen hundred and eighty, and of our Independence the one hundred and fifth year.

[SEAL.]

J. A. JONES,
Clerk U. S. Cir. Court, South. Dist. Ill's.

(Indorsed:) U. S. Supreme Court. George B. Ellery vs. Town of Seven Hickory. Writ of error. Filed Aug. 17th, 1880. J. A. Jones, clerk.

c UNITED STATES OF AMERICA, *ss:*

To George B. Ellery, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein the Town of Seven Hickory is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness S. H. Treat, district judge of said district, and one of the judges of said circuit court, at Springfield, in said district, this 17th day of August, A. D. 1880.

S. H. TREAT.

We hereby accept service of the foregoing citation this 30th day of September, A. D. 1880.

D. T. & D. S. McINTYRE,
Att'y for said Ellery.

(Indorsed:) U. S. Supreme Court. George B. Ellery vs. Town of Seven Hickory. Citation.

1 Pleas in the circuit court of the United States of America for

the southern district of Illinois, held at the city of Springfield, in said district, before the honorable Thomas Drummond, judge of the seventh judicial circuit, presiding judge of said court, and the honorable Samuel H. Treat, district judge of said district, associate judge of said court, on Saturday, the 3rd day of July, at the June term of said court, in the year of our Lord eighteen hundred and eighty, and of our Independence the one hundred and fourth year.

J. A. JONES, *Clerk.*

GEORGE B. ELLERY
vs.
TOWN OF SEVEN HICKORY. } Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 16th day of October, in the year of our Lord eighteen hundred and seventy-seven, came said plaintiff, by Messrs. D. T. and D. S. McIntyre and T. C. Mather, esq., his attorneys, and filed in the office of the clerk of said court
2 his bond for costs and precipe for summons in said cause, whereupon there issued out of said clerk's office a summons in said cause, directed to the marshal of said district to execute, which summons, together with the return of the marshal thereon, is in the words following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois.

The United States of America to the marshal of the southern district of Illinois, greeting:

We command you to summon Town of Seven Hickory, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof to be held at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto George B. Ellery of a plea of trespass on the case upon promises, to his damage, as he alleges, of two thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Su-
3 preme Court of the United States of America, at Springfield aforesaid, this sixteenth day of October, in the year of our Lord one thousand eight hundred and seventy-seven and of our Independence the one hundred and second year.

[L. S.] J. A. JONES, *Clerk.*

Return of marshal.

I hereby appoint James M. Ashmore my special deputy to execute this writ. October 17, 1877.

E. R. ROE, *U. S. Mar.*

STATE OF ILLINOIS,
Coles Co.:

CHARLESTON, ILL., *Oct. 29th*, 1877.

I this day served the within writ by reading the within and deliver-

ing a true copy of the same to John J. Foster, supervisor of the town of Seven Hickory.

JAMES M. ASHMORE,
Special Deputy.

(Endorsed:) Filed January 8, 1878.

And heretofore, to wit, on the said 16th day of October, 1877, said plaintiff filed in the clerk's office of said court his declaration in said cause, which is in the words following, to wit:

Declaration.

UNITED STATES OF AMERICA.
Southern District of Illinois:

4 In the circuit court of the United States within and for the southern district of Illinois, to the January term, A. D. 1878.

George B. Ellery, who is a citizen of the State of New York, complains of the Town of Seven Hickory, which is a corporation created under the laws of the State of Illinois, and situated in said southern district, and doing business therein, in a plea of assumpsit.

For that whereas the defendant on, to wit, the first day of March, A. D. 1872, at, to wit, the circuit and district aforesaid, made its eighty-nine (89) certain promissary notes or coupons in writing, and in and by each of said promissory notes or coupons severally promised to pay to the bearer thereof at the First National Bank in Charleston, Illinois, at, to wit, the circuit and district aforesaid, the sum of one hundred dollars on, to wit, the first day of March, A. D. 1877, which period had elapsed before the commencement of this suit, and the said plaintiff before the commencement of this suit, to wit, on the day and year last aforesaid at, to wit, the district aforesaid, became and was and still is

5 the lawful bearer of each and every of the said promissary notes or coupons, and the defendant in consideration of the premises and promises respectively as aforesaid, then and there promised to pay the said several sums of money respectively to the plaintiff according to the several tenor and effect thereof respectively.

And whereas also the said defendant afterwards, to wit, on the first day of October, A. D. 1877, at, to wit, the circuit and district aforesaid, was and still is indebted to the said plaintiff in the sum of ten thousand dollars for so much money then before that time paid, laid out, and expended by the said plaintiff in and about the business of the said defendant at its special instance and request. And in the other and further sum of ten thousand dollars for so much money then before that time lent and advanced to the defendant by the said plaintiff for the use and benefit of the said defendant at its special instance and request. And in the other and further sum of ten thousand dollars for so much money then before that time had and received by the said defendant to and for the use of the said plaintiff. And in the

6 further sum of ten thousand dollars for so much money found to be due from the said defendant upon an account then before that time stated between them. And in the further sum of ten thousand dollars for so much money before that time and then due and payable from the said defendant to the said plaintiff for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendant to said plaintiff and by said plaintiff forborne

to said defendant for divers long spaces of time before then elapsed at the like special instance and request of the said defendant.

And whereas the defendant afterwards, to wit, on the day and year last aforesaid, and at, to wit, the circuit and district aforesaid, in consideration of the premises, then and there promised to pay the said several sums of money in the said several counts in this declaration mentioned to the plaintiff on request, yet said defendant has disregarded its said several promises and has not, though often requested, paid the said several sums of money, or either of them or any part thereof, to
7 the damage of the said plaintiff in the sum of ten thousand dollars, and therefore he brings his suit, &c.

D. T. & D. S. McINTYRE,
Pl'ff's Atty's.

Town of Seven Hickory to George B. Ellery, Dr.

To money laid out and expended	$10,000
To money lent and advanced	10,000
To money had and received	10,000
To money due upon account stated	10,000
To interest due, &c.	10,000

Copies of coupons sued on.

TOWN OF SEVEN HICKORY.

$1,000.00.] INTEREST WARRANT. [No. 5.

For one year's interest on bond number 23 for one thousand dollars, payable to the Tuscala, Charleston & Vincennes Railroad Company, the town of Seven Hickory, Coles County, Illinois, will pay to the bearer on the first day of March, A. D. 1877, one hundred dollars at the First National Bank in Charlestown, Illinois.

M. E. O'HAIR,
Supervisor Town of Seven Hickory.

Twenty-six (26) of the coupons sued on in this suit are in all
8 respects identical in words and figures with the above copy except as to the number of the bond, and said coupons are for interest accruing upon bonds numbered, respectively, No. 23, 24, 25, 26, 27, 28, 29, 37, 3, 5, 8, 9, 10, 11, 13, 14, 15, 16, 17, 32, 34, 36, 2, 40, 38, 39, said coupons being all numbered "No. 5."

TOWN OF SEVEN HICKORY.

$1,000.00.] INTEREST WARRANT. [No. 6.

For one year's interest on bond number 23 for one thousand dollars, payable to the Tuscola, Charlestown & Vincennes Railroad Company, the town of Seven Hickory, Coles County, Illinois, will pay to the bearer on the first day of March, A. D. 1878, one thousand dollars at the First National Bank in Charleston, Illinois.

M. E. O'HAIR,
Supervisor Town of Seven Hickory.

Thirty-one (31) of said coupons sued on in this suit are in all respects identical in words and figures with the above copy except as to the number of the bond, and said coupons are for interest accrued upon

bonds numbered, respectively, No. 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13,
9 15, 17, 18, 19, 20, 32, 33, 34, 40, 38, 39, 23, 24, 25, 26, 27, 28, 29, 36, 37, said coupons being all numbered "No. 6."

TOWN OF SEVEN HICKORY.

$1,000.00.] INTEREST WARRANT. [No. 7.

For one year's interest on bond number 37 for one thousand dollars, payable to the Tuscola, Charleston & Vincennes Railroad Company, the town of Seven Hickory, Coles County, Illinois, will pay to the bearer on the 1st day of March, A. D. 1879, one thousand dollars at the First National Bank in Charleston, Illinois.

M. E. O'HAIR,
Supervisor, Town of Seven Hickory.

Thirty-two (32) of said coupons sued on in this suit are in all respects identical in words and figures with the last above copy except as to the number of the bond. Said coupons are for interest accrued upon bonds numbered, respectively, No. 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 33, 34, 2, 37, 36, 29, 28, 27, 26, 25, 24, 23, 39, 38, 40, said coupons being all numbered "No. 7."

10 *Stipulation.*

ELLERY
vs.
TOWN OF SEVEN HICKORY.

It is hereby stipulated by and between the parties to this suit, that for the purpose and in consideration of having the amount involved in this suit sufficiently large to secure to either party the right to appeal this cause to the Supreme Court of the U. S., the said plaintiff shall deposit with the clerk of said circuit court all the coupons above described, and the same shall be considered as in evidence in this cause without objection, other than such objections as go to their validity; and in case the said circuit court shall find in favor of the said plaintiff then all the said coupons above described shall be merged into and form a part of such judgment; and either party to this suit shall have right to appeal from the judgment of the court, whatever it may be, if he or it see fit so to do, and no question shall hereafter be raised as to
11 the legality of said above-described coupons having been so merged into such judgment.

JOHN M. PALMER, *for Def'd't.*
D. T. & D. S. McINTYRE, *Pl'ff's Att'ys.*

(Endorsed:) Filed October 16, 1877, J. A Jones, clerk; and on the 25th day of June, 1879, said defendant filed in the said clerk's office its plea in said cause, which is in the words following, to wit:

Plea.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the district court of the United States for southern district of Illinois.

TOWN OF SEVEN HICKORY
ats.
GEORGE B. ELLERY. } Assumpsit.

And the said defendant comes and defends the wrong and injury when, &c., and says that they did not undertake and promise in the manner and form as the plaintiff has complained against the defendant, and of this the defendant puts itself upon the country.

PALMER & CRAIG,
Att'ys for Def'd't.

Similiter.

And the plaintiff doth the like.

12 D. T. & D. S. McINTYRE,
Pl'ff's Att'ys.

(Endorsed:) Filed June 25, 1879. J. A. Jones, clerk.

And afterwards, to wit, on the Wednesday, the 25th day of June, in the year of our Lord eighteen hundred and seventy-nine, the following order was made in said court, and entered of record in said cause:

Trial of cause.

GEORGE B. ELLERY
vs.
TOWN OF SEVEN HICKORY. } Assumpsit.

This day comes as well the plaintiff, by Messrs. D. T. and D. S. McIntyre, his attorneys, as the defendant, by Messrs. Palmer and Craig, its attorneys, and the issue joined by consent is tried by the court, a jury being waived, and the court, having heard the evidence and argument of counsel, takes the same under advisement.

And afterwards, to wit, on Wednesday the 28th day of January, A. D. 1880, the following order was made in said court, and entered of record in said cause:

GEORGE B. ELLERY
vs.
TOWN OF SEVEN HICKORY. } Assumpsit.

13 *Declaration amended. Cause set for hearing before a full bench.*

On motion of plaintiff, by Messrs. D. T. & D. S. McIntyre, his attorneys, leave is granted to amend declaration, and on further motion this cause is set for hearing before full bench.

And afterwards, to wit, on Saturday, July 3d, in the year of our Lord eighteen hundred and eighty, the following order was made in said court, and entered of record in said cause:

Judgment.

GEORGE B. ELLERY
vs.
TOWN OF SEVEN HICKORY. } Assumpsit.

This day comes as well the plaintiff, by Messrs. D. T. and D. S. McIntyre and T. C. Mather, esq., his attorneys, as the defendant, by Messrs. Palmer & Craig, its attorneys, and the issue joined by consent is tried by the court, a jury being waived, and the court, having heard the evidence and argument of counsel, finds the issue for the plaintiff, and assesses his damages at the sum of ten thousand one hundred and twelve dollars and ninety-five cents.

It is, therefore, ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of ten thousand one hun-
13½ dred and twelve dollars and ninety-five cents, his damages aforesaid, assessed by the court, together with the sum of $
dollars and cents, his costs and charges by him about his suit in this behalf expended, and that execution issue therefor.

And afterwards, to wit, on the 17th day of August, A. D. 1880, the said plaintiff filed his bill of exceptions in said cause which is in the following words, to wit:

Plaintiff's bill of exceptions.

In the United States circuit court, southern district of Illinois.—To the June term thereof, A. D. 1880.

GEORGE B. ELLERY, PLAINTIFF,
vs.
THE TOWN OF SEVEN HICKORY, DEFENDANT. } In assumpsit.

Be it remembered that on this the third day of July, A. D. 1880, this cause came on for trial before the honorable Thomas Drummond, circuit judge, and the honorable Samuel H. Treat, judge of the district court, without the intervention of a jury, the parties having waived a jury according to the form of the statute in such case made and provided.

13¾ And thereupon it was agreed by the parties that all special matters of defense might be given in evidence under the general issue as if the same had been properly pleaded. Whereupon the plaintiff, to maintain the issue upon his part, offered to read in evidence a bond purporting to be signed upon behalf of said defendant by M. E. O'Hair, its supervisor, which signature thereto being admitted the defendant objected, but its objections being overruled, said bond was read in evidence, and is in the words and figures following:

UNITED STATES OF AMERICA,
County of Coles, town of Seven Hickory:

Bond for subscription of the town of Seven Hickory, Coles co., Illinois.—To the capital stock of the Tuscola, Charleston & Vincennes R. R.

No. 36. $1000.

Know all men by these presents, That the town of Seven Hickory, in

the County of Coles, State of Illinois, is indebted to the holder of this bond in the sum of one thousand dollars, lawful money of the
14 United States with interest from date at the rate of ten % per annum, payable annually on the 1st day of March in each year at the First National Bank in Charleston, Illinois, on the presentation and surrender of the respective interest coupons hereto annexed. The principal of this bond shall be due and payable on or before twenty years after the date thereof at the option of said town at the said bank in Charleston.

This bond is one of a series of bonds issued by said town of Seven Hickory in payment of its subscription of forty thousand dollars to the capital stock of the Tuscola, Charleston and Vincennes Railroad Company, numbered from one to forty inclusive, amounting in the aggregate to the sum of forty thousand dollars in pursuance of authority conferred by an act of the general assembly of the State of Illinois entitled "An act to incorporate the Tuscola, Charleston and Vincennes Railroad Company," approved March 7th, 1867, and "An act to amend the
15 foregoing act," approved March 25th, 1869, and of an election of the legal voters of the town of Seven Hickory, Ill's, on the 2nd day of April, 1867, under the provisions of said act of incorporation, and for the payment of the said sum of money and accruing interest thereon in manner aforesaid the faith of the town is hereby irrevocably pledged, as also its property, revenue and resources.

In testimony whereof and in pursuance of the provisions of said act of incorporation the supervisor of the said town of Seven Hickory has hereunto set his hand and seal this 1st day of March, A. D. 1872.

[SEAL.] M. E. O'HAIR,
Supervisor, Seven Hickory Township.

And the plaintiff, in order further to maintain the issue upon his part, offered in evidence eighty-nine (89) coupons cut from said bonds, of the following tenor, differing only in number and time of maturity, to wit:

TOWN OF SEVEN HICKORY.

$1000.00] INTEREST WARRANT. [No. 5.

16 For one year's interest on bond number 5 for one thousand dollars, payable to the Tuscola, Charleston & Vincennes Railroad Company, the town of Seven Hickory, Coles County, Illinois, will pay to the bearer on the first day of March, A. D. 1879, one hundred dollars at the First National Bank in Charleston, Illinois.

M. E. O'HAIR,
Supervisor, Town of Seven Hickory.

Which signature thereto was admitted to be genuine by the defendant; and it was further admitted by the defendant that said supervisor of said town made and issued forty (40) bonds of like tenor of the one offered in evidence, that the coupons offered in evidence were issued with said bonds, and that the plaintiff is a bona fide holder for value of the coupons offered in evidence.

And the said plaintiff, to further maintain the issue upon his part, offered in evidence an act of the general assembly of the State
17 of Illinois (contained in a printed book of the statutes of said State, being volume 2 of the private laws of the session of 1867, page 568) entitled "An act to incorporate the Tuscola, Charleston and

Vincennes Railroad Company," approved March 7, 1867, and read in evidence against the objection of the defendant; said objection being overruled by said court.

Sections nine (9), ten (10), and thirteen (13) of said act are as follows:

"SECTION 9. Elections may be held by or in any county, city, incorporated town or township, situated on or near the line of said railroad as the same may be surveyed or located hereafter, upon the question whether such county, city, town, or township shall donate to said company or subscribe for any specified amount in shares of the capital stock of said company; twenty days' notice shall be given of the time of holding such elections, and the election shall be conducted in the mode prescribed in an act entitled an act supplemental to an act en-
18 titled "An act to provide for a general system of railroad incorporation," approved November 6, 1849, or in the mode prescribed in any other general law relating to such elections, or in the mode in which county, city, town, or township elections are usually conducted; and if a majority of the votes actually cast at any such election shall be for subscription, it shall be the duty of the county clerk or board of supervisors where township organizations exist, or the corporate authorities of such county, city, or town, or the supervisor of such township, to subscribe without unnecessary delay, upon request of said company, for shares of said capital stock to the amount so voted, and to issue and deliver to said company without unnecessary delay the same amount as the stock so subscribed of the bonds of such county, city, town, or township, as the case may be, payable at any time specified in not exceeding twenty years from their date, with annual or semi-
19 annual coupons for not exceeding ten per centum interest per annum attached; which bonds and coupons may be made payable within or without the State as said company may request, and the provisions of the above-mentioned act approved November 6, 1849, except such as are inconsistent with the provisions of this act, shall apply to and govern every election refered to in this section, in getting up the elections and other matters connected with or growing out of such elections, but this act shall govern said elections so far as it is applicable to them.

"SECTION 10. It shall be the duty of such county court, board of supervisors, city or town corporate authorities, or township clerks, to order the holding of such elections and give notice thereof upon being requested so to do by fifteen of the legal voters of such county, city, town or township, as the case may be.

"SECTION 13. This act shall be deemed a public act and take effect from and after its passage."

20 And thereupon the plaintiff rested his case.

DEFENDANT'S EVIDENCE.

Whereupon the defendant, to maintain the issue upon its part, proved that the general assembly of the State of Illinois adjourned sine die on the 28th day of February, 1867, on which day the bill for an act to incorporate the Tuscola, Charleston and Vincennes Railroad Company, which had passed both houses of said general assembly, was laid before and delivered to the governor, and remained in his hands until the 7th day of March, 1867, when he approved and signed the same and delivered it to the secretary of state, in whose office the same was filed, and thereupon published as a law of said State of Illinois. To the in-

troduction of which proof said plaintiff objected, but his objection was overruled by the court.

And the defendant further proved, that after the adjournment of the general assembly on the 28th day of February, 1867, there was no other meeting thereof until the first Monday in June, 1867, when
21 it was convened in special session under the proclamation of the governor, issued under the constitution of the State.

Whereupon the defendant, to further maintain the issue upon its part, offered to read in evidence the 19th section of the constitution of the State of Illinois, adopted upon the 26th day of August, 1818, which remained in force until April 1st, 1848. To the reading of which in evidence the plaintiff objected, but his objection was overruled by the court and said section read, which was in the words following:

"The governor for the time being and the judges of the supreme court, or a major part of them together with the governor, shall be deemed, and are hereby constituted, a council to revise all bills about to be passed into laws by the general assembly; and for that purpose shall assemble themselves from time to time when the general assembly shall be convened, for which, nevertheless, they shall not
22 receive any salary or consideration, under any pretences whatever; and all bills which have passed the senate and house of representatives shall before they become laws be presented to the said council for their revisal and consideration; and if upon such revisal and consideration it should appear improper to the said council, or a majority of them, that the bill should become a law of this State, they shall return the same together with their objections in writing to the senate or house of representatives (in whichsoever the same shall have originated), who shall enter the objections set down by the council at large in their minutes, and proceed to reconsider the said bill; but if, after such reconsideration, the said senate or house of representatives shall, notwithstanding the said objections, agree to pass the same by a majority of the whole number of members elected, it shall together with the said objections be sent to the other branch of the gen-
23 eral assembly, where it shall also be reconsidered, and if approved by a majority of all the members elected it shall become a law. If any bill shall not be returned within ten days after it shall have been presented the same shall be a law, unless the general assembly shall by their adjournment render a return of said bill in ten days impracticable, in which case the said bill shall be returned on the first day of the meeting of the general assembly after the expiration of the said ten days or be a law."

That during the time said constitution of 1818 was in force it was the practice of said council of revision, with one exception, to approve of such bills as it did approve of during the session of the said assembly to which they were presented.

The defendant then proved that the constitution of said State, which went into effect April 1st, 1848, contained the following section, to wit:

24 "Every bill which shall have passed the senate and house of representatives, shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it shall have originated, and the said house shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, a majority of the members elected shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall

likewise be reconsidered; and if approved by a majori y of the members elected, it shall become a law, notwithstanding the objections of the governor. But in all such cases the votes of both houses shall be determined by yeas and nays, to be entered on the journal of each house respectively. If any such bill shall not be returned by the
25 governor within 10 days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it; unless the general assembly shall, by their adjournment, prevent its return, in which case the said bill shall be returned on the first day of the meeting of the general assembly after the expiration of said 10 days, or be a law."

That said constitutional provision was in force at the time the act of said general assembly now in question is claimed to have been passed.

That bills of both a public and private character, of the following number, have been approved by the then governors of said State after the adjournment of the following sessions of said general assembly, viz.:

Session of 1835, one.
" " 1857, one.
" " 1865, a large number.
" " 1867, more than 1200.
" " 1872, twelve.
Session of 1875, two.
26 " " 1877, thirty-six.
" " 1879, six.

But the 16 section of the fifth article of the constitution of 1870 is as follows:

"§ 16. Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon its journal and proceed to reconsider the bill; if then two-thirds of the members elected agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members elected to that house, it shall become a law, notwithstanding the objections of
27 the governor. But in all such cases the vote of each house shall be determined by yeas and nays to be entered on the journal. Any bill which shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it, unless the general assembly shall, by their adjournment, prevent its return, in which case it shall be filed, with his objections, in the office of the secretary of state, within ten days after such adjournment, or become a law."

Otherwise all bills passed by said general assembly have been approved during the session of the said assembly.

That the present constitution of said State took effect August 8th, 1870.

And the defendant then objected that the said act upon which the plaintiff relied for authority in the defendant town to issue the bonds mentioned and the coupons sued on did not take effect until the
28 first Monday in June, 1867, and that for that reason the election recited in the bonds was held without authority of law, and that the said bonds and coupons were void under the provisions of the sepa-

rate article of the constitution of Illinois, entitled "Municipal subscriptions to railroads or private corporations."

But the court overruled the said objection and found the issues for the plaintiff, and assessed his damages at the sum of $10,112.95, and rendered judgment accordingly; to all of which the defendant then and there excepted, and tendered this its bill of exceptions, and prayed that the same may be signed and sealed by the court, which is done accordingly, &c.

S. H. TREAT.

We consent to the approval of the above.

D. T. & D. S. McINTYRE,
Atty's for Geo. B. Ellery.

(Endorsed:) Filed Aug. 17, 1880. J. A. Jones, clerk.

29 And afterwards, to wit, on the 17th day of August, A. D. 1880, the following stipulation was filed by the parties to said cause, to wit:

Stipulation.

In the United States circuit court, southern district of Illinois. October term, A. D. 1880.

GEORGE B. ELLERY
against
TOWN OF SEVEN HICKORY.

It is hereby stipulated by and between the parties to the case named in the caption of this record that said cause shall be submitted in the Supreme Court of the United States under the twentieth or short rule of said court. Dated this August 17th, 1880.

JOHN M. PALMER,
For Plaintiff in Error.
D. T. McINTYRE,
Att'y for said Geo. B. Ellery.

(Endorsed:) Filed August 17, 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 17th day of August, A. D. 1880, said plaintiff in error filed its appeal bond in said cause to the Supreme Court of the United States, which said bond is in the following
30 words, to wit:

Bond on writ of error to Supreme Court of U. S.

Know all men by these presents that we, The Town of Seven Hickory, J. W. Massy, J. J. Foster, C. P. Nickles, J. McNiel, W. J. Todd, J. P. Foreman, J. Nickles, J. Dice, A. J. Todd, Wm. Rosebrough, W. McDougle, Jesse B. Gray, Philip Garber, Thos. N. Cofer, and Jacob Harry, of the county of Coles, and State of Illinois, are held and firmly bound unto George B. Ellery in the penal sum of five hundred dollars, for the payment of which well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, and administrators jointly and severally firmly by these presents, sealed with our seals, and dated at Springfield, this 9th day of July, in the year of our Lord one thousand eight hundred and eighty.

The condition of the above obligation is such, that whereas the said George B. Ellery did, on the 3rd day of July, one thousand eight hundred and eighty, at a term of circuit court then being holden within and for the United States of America, in the southern district of the
31 State of Illinois, obtain a judgment against the above bounden Town of Seven Hickory for the sum of ten thousand one hundred and twelve dollars and ninety-five cents and costs of suit, from which judgment the said town has prayed for and obtained an appeal to the Supreme Court of the United States:

Now, if the said town shall duly prosecute said appeal, and shall moreover pay the amount of the said judgment, cost, interest, and damages rendered and to be rendered against town, the said appellant, in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be null and void, otherwise to remain in full force and virtue.

THE TOWN OF SEVEN HICKORY,

[SEAL.] By J. J. FOSTER, *Supervisor.*

J. W. MASSEY. [SEAL.]
J. J. FOSTER. [SEAL.]
C. R. NICKLES. [SEAL.]
J. McNEEL. [SEAL.]
W. J. TODD. [SEAL.]
J. P. FOREMAN. [SEAL.]
J. NICKLES. [SEAL.]
32 JACOB DIX. [SEAL.]
A. J. TODD. [SEAL.]
WM. ROSEBROUGH. [SEAL.]
W. McDOUGLE. [SEAL.]
JESSE B. GRAY. [SEAL.]
PHILIP GARBER. [SEAL.]
THOS. N. COFER. [SEAL.]
JACOB HARRY. [SEAL.]

(Endorsed:)

Bond approved Aug. 17, 1880; same not to operate as supersedeas.

S. H. TREAT.

(Endorsed:) Filed this 17th day of August, A. D. 1880. J. A. Jones, clerk.

33 UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, John A. Jones, clerk of the circuit court of the United States, within and for the southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed, and proceedings thereon had, in a certain cause, wherein George B. Ellery is plaintiff, and the Town of Seven Hickory is defendant, as fully as same appear of file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this fourth day of October, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth year.

[SEAL.] J. A. JONES, *Clerk.*

(Indorsement on cover:) No. 1115. The Town of Seven Hickory, plaintiff in error, vs. George B. Ellery. S. Illinois C. C., U. S. Filed 26th November, 1880.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1880.

THE TOWN OF SEVEN HICKORY, Plaintiff in Error,

vs.

GEORGE B. ELLERY, Defendant in Error.

In Error to the Circuit Court of the United States for th Southern District of Illinois.

BRIEF OF

JOHN M. PALMER,

For the Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1880.

THE TOWN OF SEVEN HICKORY, Plaintiff in Error,

vs.

GEORGE B. ELLERY, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF OF JOHN M. PALMER, FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

I. The town of Seven Hickory is a township organized under the general township organization law of the State of Illinois.

II. At a session of the General Assembly of the State of Illinois which convened on the first Monday of January, 1867, and which adjourned on the 28th day of February, 1867, a bill for an act entitled "An act to incorporate The Tuscola, Charleston and Vincennes Railroad Company," passed both Houses, and on the 28th day of February was laid before the Governor, in accordance with the Constitution.

III. On the 7th day of March, 1867, the Governor approved and signed the bill, and filed it in the office of the Secretary of State.

IV. The 21st section of the fourth article of the Constitution of the State of Illinois, in force at that date, is as follows:

"Every bill which shall have passed the senate and house of representatives shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it shall have originated; and the said house shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, a majority of the members elected shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by a majority of the members elected, it shall become a law, notwithstanding the objections of the Governor; but in all such cases the vote of both houses shall be determined by yeas and nays, to be entered on the journal of each house, respectively. If any bill shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the General Assembly shall, by their adjournment, prevent its return; in which case, the said bill shall be returned on the first day of the meeting of the General Assembly after the expiration of said 10 days, or be a law."

V. After the adjournment of the General Assembly on the 28th day of February, 1867, there was no other meeting

thereof until the first Monday in June, 1867, when it was convened in special session by the proclamation of the Governor, issued under the Constitution of the State.

VI. On the second day of April, 1867, the question of subscribing the sum of forty thousand dollars to the capital stock of the Tuscola, Charleston and Vincennes Railroad Company, was, under the supposed authority contained in the ninth and tenth sections of the act before referred to, submitted to the legal voters of the Town of Seven Hickory, and a majority of the votes cast was in favor of such subscription.

VII. Nothing was done under that vote, until after the adoption of the separate article of the Constitution of the State of Illinois, entitled "Municipal subscriptions to Railroads or private corporations," which went into effect on the second day of July, 1870, and which is as follows:

"No county, city, town, township or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation; *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

VIII. On the first day of March, 1872, the supervisor of the town of Seven Hickory, issued forty thousand dollars of

the coupon bonds of the town in payment of a subscription of like amount to the capital stock of the railroad company: the bonds were alike in form, and each contained the following recital:

"This bond is one of a series of bonds issued by said town of Seven Hickory in payment of its subscription of forty thousand dollars to the capital stock of the Tuscola, Charleston and Vincennes Railroad Company, numbered from one to forty, inclusive, amounting in the aggregate to the sum of forty thousand dollars in pursuance of authority conferred by an act of the General Assembly of the State of Illinois, entitled "an act to incorporate the Tuscola, Charleston and Vincennes Railroad Company," approved March 7th, 1867, and "an act to amend the foregoing act," approved March 25th, 1869, and of an election of the legal voters of the town of Seven Hickory, Ill., on the 2d day of April, 1867, under the provisions of said act of incorporation.

IX. The coupons sued on were issued with, and are for interest upon the bonds above referred to, and the defendant in error is a *bona fide* holder for value.

X. The judgment of the court below was for the defendant in error, and sustaining the validity of the bonds, the town of Seven Hickory prosecutes this writ of error to reverse that judgment.

BRIEF.

The objection to the validity of the bonds in question is, that being issued on the first day of March, 1872, their issue was forbidden by the separate article of the Constitution of Illinois, which took effect on the second day of July, 1870.

This objection can only be met by showing that on the second day of April, 1867, when the vote of the people of the town of Seven Hickory was cast upon the question of subscription to the capital stock of the Tuscola, Charleston and Vincennes Railroad Company, there was an existing law, authorizing such vote.

If the bonds were issued in violation of a constitutional inhibition they are void.

Buchanan vs. The City of Litchfield, decided by this court at the present term.

The bill for the act to incorporate The Tuscola, Charleston and Vincennes Railroad Company, passed both branches of the General Assembly on the 28th day of February, 1867, and was, on the same day, laid before the Governor.

The General Assembly on that day adjourned *sine die*, and the bill remained in the hands of the Governor seven days after the adjournment; he then, on March 7th, 1867, approved and signed the bill and filed it with the Secretary of State.—on the first Monday in June following the General Assembly again met.

The defendant in error insisted in the court below, that the bill became a law when it was approved and signed by the Governor, March 7th, 1867; the plaintiff in error on the other hand claims that it only became a law at the meeting of the General Assembly on the first Monday in June, 1867, it not having been then returned by the Governor with his objections.

The plaintiff in error submits that the history of constitutions in the United States establishes, that it is an elementary principle of republican government, that the legislative, executive, and judicial departments ought to be distinct; the constitution of Illinois recognizes the fundamental nature of this axiomatic principle by devoting a separate chapter to its assertion, and in explanation of the extent to which its modification is admissible in practical government.

The second article of the Constitution of 1848, is as follows:

"SECTION 1. The powers of the government of the State of Illinois shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another, and those which are judicial, to another.

SEC. 2. No person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted, and all acts in contravention of this section shall be void."

The first section of the third article of the Constitution, which immediately follows that above quoted, ordains that—"The legislative authority of this State shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people."

The fourth article of the Constitution relates to the executive department, and gives to the Governor a qualified veto power; the twenty-first section of that article printed at length in the statement of the case, contains all which relates to the subject under consideration.

The Constitution which thus confers upon the Governor this qualified veto power, also, at the same time, prescribes the time and manner in which it shall be exercised.

The grant of power to the Governor, who under the Constitution possesses the executive authority of the State to participate with the Senate and House of Representatives in the essential power of legislation, is so exceptional, that it must be subjected to the stringent rule for the construction of exceptional grants of power contained in the second section of the second article of the Constitution—that is, that the power both in its extent and methods of its exercise, must be limited to the express directions to be found in the clause conferring it.

It is conceded that the qualified veto power is found in the Constitution of the United States, and in those of all of the States of the Union, but, wherever found, it is in derogation

of the political maxim which requires the separation of the powers of government, a maxim, which Mr. Madison says, "is of the greatest intrinsic value, and is stamped with the authority of the most enlightened patrons of liberty."

The State of Illinois was admitted into the Union under a Constitution adopted on the 26th day of August, 1818; under that Constitution the veto is vested in the Governor for the time being, and the Judges of the supreme court, as a council.

The nineteenth section of the third article of the Constitution of 1818, which is printed at length on page 10, of the record, provides that the Governor and Judges shall assemble from time to time, *when the General Assembly shall be in session*, and that, "All bills which have passed the senate and house of representatives shall, before they become laws, be presented to said council for their revisal and consideration. * * * If any bill shall not be returned within 10 days after it shall have been presented, the same shall be a law, unless the General Assembly shall, by their adjournment, render a return of the said bill in 10 days impracticable; in which case the said bill shall be returned on the first day of the meeting of the General Assembly, after the expiration of the said 10 days, or be a law."

Under that Constitution, which was in force from 1818 to 1848, the uniform practice in the State was to regard the council of revision as part of the legislature; it was held to be in legal session while the two houses of the General As-

sembly were sitting, and to be dissolved when the General Assembly adjourned *sine die.*

All the powers of the council of revision under the Constitution of 1818, were by the Constitution of 1848, devolved upon the Governor; it will be noticed, too, that the provisions of the 19th section of the third article of the Constitution of 1818, and the 21st section of the fourth article of the Constitution of 1848, in respect to bills like the one under consideration, are substantially alike, even in their terms; and up to the session of 1865, they were construed alike, and to deny to the Governor the power to give the effect of laws to bills left in his hands at the termination of the legislative session.

The primary argument to be deduced from the proposition that under the constitution of 1848, the Governor succeeds to all of the powers of the council of revision under the Constitution of 1818, is, that the power of the Governor with respect to the approval of bills to become laws when approved by him, is limited in its exercise to the time when the legislature is in session.

The nineteenth section of the third article of the Constitution of 1818 required the council of revision to assemble when the General Assembly should be in session, and that all bills passed by the senate and house of representatives should before they become laws be presented to the council; they were not authorized to assemble at any other time, and the want of authority to assemble imports from necessity, the want of power to act.

If, then, the council could only act during a session of the legislature, it follows that the Governor, whose power is the same as that possessed by the council, and conferred by the same language, could only act during the legislative session to give to bills the effect of laws.

Reference has before been made to the contemporaneous construction of this provision of the Constitution, and it is to be observed that the construction of the 19th section of the third article of the Constitution of 1818, up to 1848, was given to it by the co-ordinate action of the successive governors and the Judges of the supreme court of the State, who together, from time to time, constituted the council of revision.

Mr. Justice Breese, in the case of *The People vs. Hatch*, 33 *Ill.*, 144, said: "In the absence of any decision on this precise point, I am free to express my own opinion; and that is, that the council of revision, as such, as a power to revise all laws passed by the General Assembly, is not abolished by the present Constitution of the State.

The power, instead of being deposited with the Governor and Justices of the Supreme Court, is now deposited with the Governor alone. He is, to all intents and purposes, if the design of such a power is regarded, and not a tenacious adherence to terms, the Council of Revision."

The remarks of Judge Breese, above quoted, were made in discussing the provisions of the statutes of Illinois, enact-

ed before the adoption of the Constitution of 1848, prescribing the method of authenticating the laws, and which were thought to express the legislative interpretation of the 19th section of the third article of the Constitution of 1818, and by analogy, the 21st section of the fourth article of the Constitution of 1848.

The statutes then under consideration provided for the authentication of bills which had passed both houses of the General Assembly and which had been returnedby the council of revision, and upon reconsideration passed both houses by a constitutional majority; and for the authentication of bills which had passed both houses of the General Assembly and had not been returned by the council of revision within ten days, the legislature being in session, and for the legal authentication of a third class of bills. This section is so important as a legislative exposition of the Constitution, that its words will be given.

"SECTION 4. Whenever the General Assembly shall by their adjournment before the expiration of ten days after the passage of any bill, render the return of such bill by the council of revision impracticable, and the same shall not be returned on the first day of the next meeting of the General Assembly, and shall thereby become a law, the fact shall be authenticated in the manner provided in the preceding section."

Chapter 62 of the Revised Statutes of 1845, containing the foregoing section, remained in force until the revision of the

laws in 1874, though it was superseded by the provisions of the 16th section of the fifth article of the Constitution of 1870, to which attention will hereafter be directed.

To return to an examination of the section of the Constitution with a view to a comparison of its provisions with the Statute before referred to, it will be seen that all bills approved and signed by the Governor while the legislature is in session; all bills delivered to the Governor and by him returned to the house in which they originated, with his objections and afterwards passed by the constitutional majority; and bills in cases where the General Assembly, by their adjournment before the expiration of ten days after the passage thereof renders a return within that time impracticable, and not returned on the first day of the next meeting of the General Assembly, and thereby becoming laws, are considered by the legislature and are provided for; but nothing can be found in any statute of the State, or any judicial decision, which refers to the possible existence of a case where a bill has become a law by the executive approval in the recess of legislative sessions.

It will no doubt be said on the other hand, that after the sessions of 1865, and 1867, a great number of bills were approved by the Governor, and the bill of exceptions shows such to be the case; but it is to be observed too, that after the session of 1867, no example can be found until the 21st section of the third article of the Constitution of 1848, was superseded by the 16th section of the fifth article of the Constitution of

1870, which provides that "Any bill which shall not be returned by the Governor within 10 days, Sundays excepted, after it shall have been presented to him, shall become a law in like manner as if he had signed it, unless the General Assembly shall, by their adjournment, prevent its return, in which case it shall be filed with his objections in the office of the Secretary of State within ten days after the adjournment, or become a law."

The question of the power of the Governor over bills left in his hands by the adjournment of the legislature has never been directly before the Supreme Court of Illinois. This may be accounted for by the fact that of the hundreds of bills passed by the General Assembly of 1865 and 1867, the greater number were of the most trivial and unimportant character; some of them were comparatively important but the times were not favorable to careful investigation, and the meetings of the legislature took place so early that nothing was done under most of them until after they became laws by the failure of the Governor to return them.

It is hardly possible now to describe the actual condition of the State government of Illinois in 1865, and 1867; it was so completely demoralized that the Governor of Illinois, in his annual message of January 4, 1871, said: "The convention of 1870 was called by the people from a conviction well justified by the facts, that the Constitution of 1848 was no longer suited to the changed condition of the State. Under the practical construction of its provisions, the executive de-

partment was destitute of influence, the judicial deparrment was unequal to its greatly increased duties, the legislature, regardless of the limitations upon its authority, was practically the supreme power of the State. Before the adoption of the Constitution of 1870 the history of the American States presents no example of a government more defective and vicious than that of the State of Illinois. * * * The radical vice of the government under that Constitution was, that its limitations upon the powers of the departments had become obsolete, so that there remained no effective rule by which their responsibilities could be defined or enforced." And the statement of the Governor of the condition of things in 1869, which was very much as in 1865, and 1867, shows, that the aggregate number of bills introduced into both branches of the General Assembly during the session was two thousand four hundred and seventy-eight; of these upwards of fifteen hundred became laws, of which those that are special and local alone, are bound into three ponderous volumes which contain two thousand eight hundred and forty-three printed pages, and the Governor added: "It is doubtful if any such mass of crude and dangerous legislation was ever inflicted upon any people."

The practice upon which the defendant in error relies sprung up in 1865, when another practice acquired its full growth, that of reading bills three times by their titles under a suspension of the rules, on the same day and then placing a hundred or more in boxes call "an omnibus", and then conforming to the provisions of the Constitution which

required a call of the yeas and nays upon the passage of all bills, by taking a vote upon the entire contents of "the omnibus."

It is said, *that two hundred and eighty bills was the largest number ever passed by the House of Representatives of Illinois on a single vote!*

The Governor of Illinois, in 1867, had the contents of these "omnibus boxes" poured in upon him, and he disposed of them in a manner most creditable to his character for industry.

It was said in argument in the court below, that the Supreme Courts of the States of New York, Louisiana and California have passed upon the question of the power of the Governors of those states to approve bills left in their hands at the time of the adjournment of the legislature.

The case of The People vs. Bowen, 30 Barbour, 24, decided by the Supreme Court of New York, certainly goes to the extent claimed for it by the counsel for the defendant in error and we may add much beyond their necessities, for upon a constitutional provision identical in its meaning with the Constitution of the United States, it decides that the Governor may sign a bill after the adjournment of the legislature and by doing so give it the force of a law. The Judge who delivered the opinion of the court, confesses that the practice at Washington has been for the President not to sign bills or resolutions after the adjournment of Congress

but says that the practice of *some* of the Governors of New York had been different. It is impossible after reading the opinion of the judge to avoid the feeling that his reasoning is altogether unsatisfactory and that the case cannot safely be followed.

The Supreme Court of Louisiana, too, has decided that the Governor possesses the power in question. We have not the case before us so that we are unable to refer to the date of the decision, but as the 20th section of the 3d article of the Constitution of that State, adopted in 1812, and article 56 of the Constitution of 1845, and article 53 of the Constitution of 1852, relate to this subject, and are almost if not quite identical, we quote from the Constitution of 1852 all that is material to the subject: "If any bill shall not be returned by the Governor within ten days (Sundays excepted) after it shall be presented to him, it shall be a law in like manner as if he had signed it, unless the General Assembly by adjournment prevent its return in which case it shall be a law unless sent back within three days after their next session." If the ruling referred to was upon a construction of Article 60 of the Louisiana Constitution of 1864, which is, in this respect, exactly like the Constitution of the United States, except the final words "in which case it shall not be a law," which seems to us to add nothing to the obvious meaning of the provision, it is difficult to see how either can be construed to give such force to an executive signature or approval after an adjournment of the legislature.

The political history of Louisiana, during the stormy administration of Governor Warmoth, who, it is said, held a bill left in his hands for months after the adjournment of the legislature, and then to meet an emergency, in the strife of parties, approved and signed the bill and enforced it as law, shows the dangerous results, which may follow such a construction. No doubt it was contemplated by the framers of the Constitutions of Louisiana and of Illinois that bills left in the hands of the Governor by the adjournment of the legislature, should, unless returned to the next meeting of the General Assembly by the Governor, *then* take effect as laws.

Judge Breese, in support of this view, said in the case of Hatch vs. the People *supra*, "The people should not be left in doubt; they should know certainly *what* bills are laws.

The Supreme Court of California, in the case of Fowler vs Pierce, 2 Cal. 165, upon a provision of the Constitution of that state which is almost if not quite in identical terms with that of New York when the case of The People vs. Bowen was decided, held that unless the Constitution allows further time for the purpose, the governor must exercise his power of approval before the two houses adjourn, or his acts will be void.

It will be observed upon looking at the section of the Illinois Constitution that it only requires the Governor to *sign* bills presented to him and approved while the legislature is in session, and it seems to us to be clear both upon

principle and authority—quoting again from the opinion of Judge Breese in the case of the People vs. Hatch—that the provision of the Constitution means no more than this: "If the legislative session has not come to an end at the time the ten days expires, then, the Governor must return the bill to the house in which it originated, or it will be a law. If the session has terminated before that time expires the Governor can return the bill at their next session, and on the first day thereof, failing in this, the bill becomes a law.

We regret that in the submission of this most interesting question to the court we are compelled to oppose the demands of persons who are in fact, though not in law, *bona fide* holders of bonds, but we venture to hope that in this instance "a hard case" will not "make shipwreck of the law."

JOHN M. PALMER,

For Plaintiff in Error.

OFFICE SUPREME COURT U.S.
FILED
JAN 8 18[illegible]
JAMES H. McKENNEY, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1880.

THE TOWN OF SEVEN HICKORY, Plaintiff in Error,

vs.

GEORGE B. ELLERY, Defendant in Error,

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF

D. T. McINTYRE,

FOR THE DEFENDANT IN ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1880.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF D. T. McINTYRE FOR THE DEFENDANT IN ERROR.

May it please the Court.

The facts in this case, as shown by the record, are briefly these: An Act incorporating The Tuscola, Charleston and Vincennes Railroal Company was duly passed by both houses of the General Assembly of Illinois, and upon the 28th day of February, 1867, together with more than 1200 other bills, of both a public and private character, was presented to the Governor for his approval. Upon the same day the assembly adjourned *sine die*. Said Act was (within ten days) signed and approved by the Governor, March 7, 1867, and thereupon was duly filed in the office of the Secretary of State as a law, and published as a law, with the laws passed by said legislature. Said company thereupon at once organized, and entered upon the construction of its road. By the provisions of said Act municipal corporations, were fully authorized to subscribe, and take stock in said Company, and to issue their bonds to pay for the same. Afterwards and upon the 2nd day of April, 1867, an election was held in said town, by which it decided to subscribe, and did subscribe, for $40,000 of the capital stock of said Company; and to issue its bonds in that amount, bearing ten per cent. interest per annum, payable annually. Afterwards said bonds were delivered in exchange for a like amount of said capital stock, and were thereupon sold and went into the market generally. The recitals in the bonds are full; and no question is made, but that the terms of the Act, under which the bonds were issued were strictly pursued in all respects, and that said Town did receive, and still holds the stock, or consideration it was to receive for its said bonds.

It is admitted by plaintiff in error, that defendant in error, is an innocent purchaser of said bonds for value.

Other facts appear in the record, to which we will refer hereafter, as we proceed.

This suit is brought upon 89 coupons of $100 each, cut from said bonds and involves the validity of said Act, as well as the entire issue of said bonds. After an exhaustive argument in the court below, before a full Bench upon the question, as here raised, by the learned counsel upon the other side, the court rendered judgment in favor of Defendant in Error for the sum of $10,112.95; from which judgment said Town now appeals to this court.

It is insisted upon the part of the learned counsel for plaintiff in error, that "if the bonds were issued in violation of a constitutional inhibition they are void," and in support of that proposition cites the case of Buchanan vs. The City of Litchfield, decided by this court at the present term. We concede the proposition, but deny that the point is applicable here, or that the authority cited has any bearing upon the case at bar. In that case the city of Litchfield, subsequent to the adoption of the constitution of 1870, contracted a debt in excess of five per cent. of its taxable property, which was a violation of the express inhibition of that constitution.

Before proceeding further, we wish to call the attention of the court to the fact that the state of Illinois has had three constitutions. The first was adopted in 1818, the second in 1848, and the third in 1870. The Act in question having been passed in 1867, and amended in 1869, is certainly governed by the constitution then in force, that of 1848,—not by that of 1818, because the latter, had to all intents and purposes, become a dead letter upon the taking effect of the former; and why it—the constitution of 1818 shall be refered to by the learned counsel upon the other side, is more than we can understand.

The sole question, raised and relied upon by said town, to reverse said judgment and relieve itself from the payment of its bonds, is that the charter of said Rail Road Company—the Act under which it issued said bonds, and received said capital stock, having been approved by the Governor, after the adjournment of the session of the General Assembly at which the same was passed; is, it is insisted such approval was void. In other words, to use the language of the learned counsel upon the other side, "that the power of the Governor with respect to the approval of bills is limited in point of time, to the time the legislature is in session." The constitutional provision claimed to contain such limitation is the 21st Section of Article 4 which is as follows:

"SEC. 21. Every bill which shall have passed the Senate and House of "Representatives shall, before it becomes a law be presented to the Gov- "ernor; if he approve, he shall sign it; but if not, he shall return it, with "his objections, to the house in which it shall have originated; and the "said house shall enter the objections at large upon their journal and pro- "ceed to reconsider it. If after such reconsideration a majority of the mem- "bers elected shall agree to pass the bill, it shall be sent, together with the

"objections, to the other house, by which it shall likewise be reconsidered; "and if approved by a majority of the members elected, it shall become a law, "notwithstanding the objections of the Governor; but in all such cases the "votes of both houses shall be determined by ayes and nays, to be entered "on the journal of each house respectively. If any bill shall not be return- "ed by the Governor within ten days (Sundays excepted) after it shall have "been presented to him, the same shall be a law in like manner as if he "had signed it, unless the General Assembly shall, by their adjournment prevent its return; in which case the said bill shall be returned on the first "day of the meeting of the General Assembly after the expiration of said "ten days or be a law."

It is insisted, therefore, that as such approval of said Act was void (and not otherwise authenticated;) and that as the same was not returned by the Governor upon the first day of the ensuing term of said Assembly, after the expiration of said ten days, it did not become a law until the first day of such next Term; which in this instance commenced in June, 1867.

The Supreme Court of Illinois in commenting upon this identical clause of the Constitution of 1848 and this identical question, in 38 Ill. R. p. 185, say:

"Were it conceded, that the bill was regularly passed by both branches "of the General Assembly and regularly placed in the hands of the Gov- "ernor for his approval, and were it also conceded, that the Governor failed "to return it on the first day of the next regular session, and that it had be- "come a law, still it is not authenticated * * * when * * a bill has "been thus passed, and presented to the Governor for his action, and he "fails to approve and sign, or shall fail to return it with his objections * * * "on the first day of the next meeting of the General Assembly, it is declar- "ed to be a law; but it fails to prescribe any mode in which it shall be "authenticated. Courts must have some means of knowing when bills are "passed, and they must receive such knowledge through the medium of "evidence. This they can only know through record evidence, furnished "at the time, and by the department entrusted with the law making power. "Whether bills have or have not become laws, can only be known from "the evidence which the Journals, and the original bill with its endors- "ments afford. "(on page 187)" In the cases before referred to it was held "that the second, third and fourth sections of chapter sixty-two of the Re- "vised Statutes were in force, notwithstanding the adoption of the new "constitution * * * (then on page 188 follows a copy of the Statute pre- "scribing the form for authenticating bills by the Secretary of State, when "the Governor fails to returnthem with his objections, to the next General "Assembly." On pape 189, the court say:)

"Conceding that the bill was regularly passed by both Houses, and was "regularly presented to the Governor for approval, and the Journals of the "session of 1865 failed to show that the bill was returned, with the Gover- "nor's objections, on the first day of the next session; still the bill is not "authenticated in the manner required by the fourth section of chapter "sixty-two. In such a case we can only take notice of, and act upon laws

"thus authenticated. The law has prescribed this mode of authenticating "acts, and we cannot regard, any bill as a law, unless it is authenticated by "the Governor's approval, or as required by the second, third or fourth "sections of chapter sixty-two, as the case may be."

Wabash &c., R. R. Co. vs. Hughes, 38 Ill., 174.

The theory of the argument is, that the approval of the Governor, after the adjournment is a nulity.

The only authentication the act in question received was such approval and none other. If that be true, then the bill must be authenticated by the Secretary of State, as provided by law; otherwise it is a nulity.

The argument of the learned counsel proves too much. Such Acts are not, and never have been laws, if his theory be correct.

But again, it is one of the settled rules of construction that the courts will, in construing a constitutional provision, have regard to what is termed

A CONTEMPORANEOUS OR PRACTICAL CONSTRUCTION.

In commenting upon this rule, Judge Cooley, in his valuable work on Constitutional Limitations on page 67 says: "An important question "which now suggests itself, is this: how far the contemporaneous con- "struction, or the subsequent practical construction, of any particular pro- "visions of the constitution, is to have weight with the courts, when the "time arrives at which a judicial decision becomes necessary; contempora- "neous construction may consist simply in the understanding with which "the people received it at the time; or in the acts done in putting it in op- "eration, and which necessarily assume that it is to be construed in a par- "ticular way. * * * Where there has been a particular construction "which has been acquiessed in for a considerable period, considerations in "favor of adhering to this construction sometimes present themselves to "the courts with a plausibility and force which is not easy to resist. In- "deed, where a particular construction has been generally accepted as "correct * * * it is not to be denied that a strong presumption exists that "the construction rightly interprets the intention. Especially when this "has been given by officers in the discharge of their duty, and rights have "accrued in reliance upon it, which would be divested by a decision that "the construction was erroneous, the argument *ad inconvenenti* is sometimes "allowed to have great weight."'

The Supreme Court of the State of Illinois referring to this rule say: "That the legislatures have passed and the Governor approved, the large "number of like charters, as set forth in the respondents answer, commenc- "ing with the first legislature in 1849 passing one such charter; and in "1851 passing several such charters, and so down, is not questioned by the "relator. Nor that there has been various suits at law in the courts of this "state as set forth in the answer, where this question of constitutionality was "*never raised*. This is a contemporaneous and practical construction of "the constitution of 1848 in this respect which is entitled to great weight. "* * * The case of The People vs Dayton 55 N. Y. 377, is quite like "the present in the facts of practical construction, where the court say: "Every year from 1853 to the present time the legislature has passed acts

"of a character similar to the one in question, which have received the ap-"proval of the Executive and have been acted upon by state officers, with-"out challenge; so that for nearly twenty years, through all the changes of "public officers, a practical construction has been given to the clause in "question, in accordance with the views here indicated.

"The practical construction of the clause in question by the legislature "* * * continued to the present time, which has been acquiesced in, and "acted upon by the executive and administrative departments of the Gov-"ernment, and which so far as we know, has never been questioned, is en-"titled to great, and we think controlling weight in its interpretation. It "has almost the force of a judicial exposition (Storey on Const. Sec 408) "and unless such legislation and practice are manifestly in violation of the "words used, the greatest weight should be given to it in construing "them." 93 Ill R 200, 201

Where either of the departments of government, or officers thereof, acting under the responsibility of an oath, is called upon to perform an official duty, under and in pursuance of any constitutional provision, and in so doing, place a construction upon such provision, which has been acquiesced in, for any considerable period, and accepted as being correct, and rights have accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the courts will uphold such construction, although they may be satisfied that such construction was erroneous when first made.

This proposition is sustained by very high authority, as is shown by the following cases:

Johnson vs. Joliet &c. R. R. Co., 23 Ill. R. 207.
Bingham vs. Miller, 17 Ohio, 446.
The People &c. vs. Hatch, 33 Ill. 17.
Kneeland vs. The City of Milwaukee, 15 Wisconsin, 455.
The People vs. Maynard, 15 Mich. 470.
Britton vs. Ferry, 14 Mich. 66.
Union Insurance Co, vs. Hoge, 21 How. 66.
Plummer vs. Plummer, 37 Miss. 185.
Coutant vs. People, 11 Wend. 511.
Farmers' and Mechanics' Bank, vs. Smith, 3, S. & R. 63.
Norris vs. Clymer, 2 Penn. St. 277.
Morris vs. City of Reading, 21 Penn. St. 183.
United States vs. Gilmore, 8 Wall, 330.
Lafayette &c. R. R. Co. vs. Geiger, 34 Ind. 203.
The People Ex. Rel. vs. Lowenthall, 93 Ill. 200 and 201.

The record in this case discloses the fact, that it has been the practice of some of the Governors of the State of Illinois, to a greater or less extent, since the adoption of the constitution of 1848, (commencing as far back as the session of 1857; not 1865, as stated by counsel,) to sign and approve of bills after the adjournment of the legislature; and that such is the practice at the present time, under the constitution of 1870. They so construed the provisions of the constitution we are considering; and in no single instance in

all the multiplied legislation in that state, has that construction been called in question or denied. Further, the record discloses this startling fact, that after the adjournment of the session of the General Assembly at which the Act in question was passed, there were more than twelve hundred (1200) bills both of public and private character, approved by the Governor after the adjournment of that assembly.

Again after the adjournment of various sessions of said General Assembly (as shown by this record) other than the one at which the Act in question was passed, and covering a period of many years, there were large numbers of Acts of both a public and private character, approved, the same as the act in question—after the adjournment of the General Assembly; and in all the thousands of Acts, so approved and signed, the validity of no single one of them has, in a single instance, in any court, place, suit or proceeding, been called in question, until at the trial of this case in the court below. Neither has such practice of the Governors of said state in so approving Acts after such adjournment of said Assembly, ever, even been criticised, as being improper, by any court of said State. Certainly not by the Supreme Court thereof.

Again, we insist that the legislative department itself, placed a like construction upon the said constitutional provision. When the legislature piled that cart load of more than 1200 bills into the office of the Governor, as did previous legislatures upon the last day of their session, can it be supposed that they were not cognizant of the practice of the Governors, in approving bills after the adjournment of the Assembly. Can it be supposed that the Legislature did not then intend that these bills should be approved by the Governor after their adjourment? and that he had the legal right to do so? We certainly think they did.

Again, as shown by the Record, the Act in question was amended by an Act of said General Assembly, passed and approved March 25th, 1869. (This fact appears upon the face of the bond offered in evidence.) This we insist was a recognition, by said Assembly, of the validity of the Act in question.

Therefore and in fact various Governors of said State, as well as the legislatures themselves, have construed said constitutional provision as giving the executive thereof, the right and power, legally, to approve of Acts of the General Assembly after its adjournment. And this construction, for more than an ordinary life-time has been uninterruptedly acquiesced in, sanctioned and relied upon, both by the legislative and judicial departments of the state, as well as by the people themselves, as being the true construction, to be placed upon such constitutional provision. We insist that this certainly amounts to a contemporaneous and practical construction of the Section of the constitution we are considering. And we further insist most respectfully that this Honorable Court should feel itself bound by such construction, even in case it should be inclined to adopt a different view were the question one of first impression.

It is useless for the learned counsel to pretend that the acts thus approved after the adjournment of the legislature were of a "trivial and unimpor-

tant character." The fact is that some of the Acts thus approved are of the most important now upon our statute book; that men have been tried, sentenced, and imprisoned in the penitentiary of the state, under such laws will not and cannot be denied.

The difficulty is not aided by the shortness of time that intervened between the sessions of the Assembly in 1867. That was not the case with the other sessions of the Assembly, where acts were thus approved.

Besides, if those acts are to become laws, by reason of not having been signed and returned by the Governor with his objections thereto, to the meeting of the next ensuing General Assembly, then they must have been authenticated.

There is no middle ground in the matter; the Acts became laws when approved, or never. The theory of the counsel goes to the destruction of of every every law in the state of Illinois, which was approved after the adjournment of the legislature.

Again, "The rule is well established that where the consequences of a "particular construction of a constitution or law would render its operation "mischievous, that construction should be avoided, provided it is suscepti- "ble of a different one."

The People vs. Marshall, 1 Gilman (Ills.) 688.

The People vs. Lowenthal et al, 93 Ill. 204.

Cooley on Const. Limi's 65.

The record furnishes indisputable proof, that thousands of Acts of the General Assembly of the State of Illinois; "Acts of both a public and private character" governing as they must the transfer and conveyance of both real, and personal estate, and the rights of persons, were approved, after the adjournment of the session of the Assembly, the same as the Act in question. How can this or any other court measure or by the utmost stretch of the imagination fortell the character and extent of the mischievous and destructive consequences that must and would inevitably follow by declaring all that mass of legislation void, which must be true, if they were not legally approved or authenticated, as above stated.

Again the dire consequences of such an upheaval and overturning would not be confined to the jurisdictional limits of the State of Illinois. There are at the present time millions of municipal bonds now outstanding, and held by residents of other states, a very large per cent, of which would be swept out of existence, in case the rule as contended for by the counsel on the other side should prevail.

The case at bar furnishes a fitting illustration. A series of $40,000 of bonds is involved in this case: The Town that issued them does not question or deny the justness of the debt. It tacitly admits that the debt is just, and that it received full value for every bond it issued. If this municipal corporation can successfully repudiate its debts for the reason assigned, this court may be assured that others, however sacred their obligations, will not be slow to avail themselves of the same immunity.

The above is only one of the many instances that might be given of the extended and "destructive consequences" that would ensue in case the

construction placed by the learned counsel upon the constitutional provision we are considering should be adopted. We certainly think that these "mischievous consequences" will, of themselves alone, be too serious to the people of the state of Illinois, and to the people of other states and countries to warrant this court in following such construction, especially so, in view of the fact, that the provision is susceptible of a different construction.

Let it be borne in mind that the illegality of the approval of the Act in question by the Governor is alleged by the plaintiff in error, for the purpose of defeating its bonds; that is its defense.

The question now presented is: Has the Plaintiff in error established that said Act of the Governor was unconstitutional? Has it clearly demonstrated that the Governor was, under the express provisions of the constitution of 1848, the one in force when the Act in question was paased, absolutely forbidden; and that it was a plain and unmistakable usurpation of a power therein prohibited for him to sign bills after the adjournment of the legislature? We repeat, under the express provisions of the constitution then in force; that, and that alone, must govern.

A clear and irresistable case, divested of all reasonable doubt, must be shown to defeat a law; whereas upon the other hand the courts will exhaust every possible means to support the law; and it is only after all means have failed that the courts will so declare. In the case at bar the logic of the entire argument of the learned counsel, in its widest sweep, is that because, it seems to have been the practice of the "council of revision" under the constitution of 1818 to remain in session during the sitting of the legislature, and no longer; and as it is thought that by construction, the Governor, under the constitution of 1848 "succeeds to all the powers of the counsel of revision;" therefor, he concludes, that "the Governor is limited, in the approval of bills to the time the legislature is in session."

The constitution of 1818, nor any practice under it, has, as we think, the slightest thing to do with the validity of a law passed and approved under, that of 1848; the sole question, is what express provision of the constitution of 1848 has been violated? If any has been, it is Section 21 of Article 4, copied at length above.

We insist that a fair construction of that section not only repells the idea, that the Governor is limited in the approval of bills, to the time the legislature is in session, but that it in fact authorized him to approve bills after the adjournment thereof. The Section contains three clauses, the first is, "Every "bill which shall have passed the Senate and House of Representatives, "shall, before it becomes a law, be presented to the Governor, if he ap- "prove he shall sign it." (The remainder of the Section has no reference to a case where the Governor has signed the bill.) Under the forgoing it is undoubtedly the duty of the Governer to sign the bill if it meets his approval. But when? During the session of the General Assembly? The constitution does not so prescribe; the language cannot be tortured into such a construction. In fact no restriction whatever is, by that clause, laid upon the Governor, as to the time within which he must sign the bill; he usurps no power prohibited by signing the bill after the adjournment of

the General assembly. The sole duty enjoined upon him is, "if he approve" the bill, "he shall sign it;" the mandate is clearly imperative, if the bill meets his approval he shall sign it; no discretion is left him in the performance of that official duty, whether the legislature is in session or not; In the approval of bills he acts wholly independent of that body; their adjournment is no excuse for him. The presence of that body cannot aid him, nor interfere with him in any respect, in the approval of bills. If the bill comes into his hands, upon the last day of the session of the assembly—as did the bill now in question, together with more than 1200 other bills, is there anything then that relieves him of the prompt fulfillment, of a sworn official duty, although the legislature may have adjourned? Clearly nothing. Public interest and public policy, his official oath, and the mandate of the constitution, all, alike demand that if he approve the bill he shall sign it without delay.

If there is anything in that clause that restricts the Governor in the approval of bills to the time the legislature is in session, we confess we are unable to see it.

The next clause has reference solely, to a contingency when the Governor vetoes a bill during the continuance of the session, and the course to be pursued by the assembly in reconsidering the bill. A state of case that has no application to the case at bar.

Now as to the remaining clauses of said Section, this, as a whole, has reference to that class of bills *which have* NOT *been signed and approved* by the Governor. Note the language:

"If any bill shall not be returned by the Governor within ten days (Sun-
"days excepted) after it shall have been presented to him, the same shall
"be a law in like manner as if he had signed it, unless the General Assem-
"bly shall, by their adjournment, prevent its return; in which case, the
"said bill shall be returned on the first day of the meeting of the General
"Assembly after the expiration of said ten days or be a law."

This relates, as we think, first, to bills which the Governor has *retained*, and *neglected* for ten days (Sundays excepted) during the session of the Assembly, to sign, in which event, the "same shall be a law in like manner as if he had signed it."

"In case, however, the legislature shall adjourn before the expiration of said ten days, and the Governor *would not* sign and approve the bill, *but insisted upon vetoing it*, then, there being no legislative body in session, he is directed to return the bill on the first day of the meeting of the Assembly next thereafter with his objections, and in case of his neglect in that regard, the bill should become a law. *All this has* NO *reference whatever to cases where the Governor* DOES APPROVE *the bill.*

If he does sign and approve the bill, then, all the latter part of the Section, relating to the course to be pursued, in case of a veto being interposed has no application. It will be time enough to consider such a state of case when presented, certainly the case at bar does not.

It is quite clear *that it is only* when the Governor *disapproves, that the return of a bill is contemplated; When he signs a bill he does not return it*, he sends it to the Secretary of State, who files it in his office.

The course then to be pursued by the Governor, in case he determines to veto the bill, and the legislature shall adjourn before the expiration of "the ten days" is clearly defined by the constitution: NOW THE QUESTION ARISES: *What course shall the Governor pursue when the legislature, after having placed a bill in his hands, then, within ten days shall adjourn, and upon examination of the bill he finds that it does meet with his appoval?* What then becomes his duty in the premises? For this contingency the constitution has not in terms provided. He can derive no light from the latter part of the Section; that refers to cases, where he *vetos the bill during the session*—where he neglects for ten days (Sundays excepted) when the legislature is in session to sign the bill;—and where the legislature during said ten days, adjourns, and he still wishes to *veto the bill.* He must therefore be guided, by the preceeding, or first part of the section; by reference to that, he finds, as above stated, the mandate of the constitution to be clear and pre-emptory, viz: "If he approves he SHALL *sign it.* Not that he *may* sign it; *He shall sign it.* The length of time he may occupy in considering *such* a bill is not fixed; but the constitution is mandatory that when he *has decided* to approve a bill, then he *shall sign it.* When any law is passed, it is to be supposed that the public interest demands it; that it is a public necessity; then why should the public be delayed in the enjoyment of, or be deprived of the benefit of the law, when the legislature has passed the bill, and the Governor has approved and signed it? No good purpose whatever, as we think, could be subserved by a prolongation of the session. No purpose as indicated, or declared by the constitution could be affected or aided by it.

When a bill has been passed by the two houses of the General Assembly, and approved by the Governor, he does not return it to either of said house; the houses have nothing further to do with it; their duties are ended, and the bill has become a law; If they afterwards become dissatisfied with the law, they must pass another law repealing it. And herein consists the falicy of the argument of the counsel upon the other side. It assumes that the General Assembly *has some duty*—he does not say what, —to perform, relative to the bill, after it has been signed, and approved by the Governor. Whereas, under the constitution we are considering, the houses have nothing whatever to do with the bill; their duty is complete, their judgment is expressed; they can neither advise, compel, or resist the Executive in the performance of the functions of his office, or department of government; it would be the height of assumption and usurpation of power for them to attempt such a thing. In fact by the express provisions of that fundamental law, the legislative department is inhibited, and forbidden, from the slightest encroachment upon the jurisdiction and and domain of the Executive. In this we adopt the argument of the learned counsel.

In speaking upon this subject the Supreme Court of Illinois, in construing the constitution of 1848, in the case of The People &c. vs. Bissell, reported in 19th Ill. R on page 231, say

"Neither of the three great departments into which our government is

"by the constitution divided, is subordinate to, or may exercise any control "over another, except as is provided by the constitution; (On page 233) "When acting within the limits assigned to each, ***neither can control or dic-*** "***tate to the other.*** The presumption is that one is as likely to be right, or "as liable to err as the other." When therefore a bill has been passed by the two houses, and sent to the Governor, they have no further control over either it or him. The duty of the Executive then begins; and in this he acts wholly independent of the two houses. As above remarked, when the Governor has signed a bill during the session he does ***not return*** it to either house? he sends it to the Secretary of State, who files it in his office as a law. Why cannot the Executive perform that duty just as well, after the two houses have adjourned, as when they were in session? He frequently, no doubt, as a matter of information apprises them, during the session, that he has signed a bill, or list of bills; but he is under no necessity or obligation to do so. The People vs. Hatch, 19th Ill. R 283.

The constitution of Illinois, in no part of it, either expressly or impliedly, ***prohibits*** the Governor from signing bills, after the adjournment of the General Assembly; neither is it a clear usurpation of a power ***prohibited*** for him to do so; but upon the contrary—if our argument be sound, it is his plain and manifest duty to sign the bill promptly, and without delay as soon as it receives his approval, whether the legislature is in session or not.

When the act is passed, approved by the Governor, and filed in the office of the Secretary of State, be the Legislature in session nor not, "the People" cannot "be left in doubt," will certainly know "what bills are laws."

The constitution we are considering was taken very largely from that of the State of New York adopted in 1846, and almost verbatim, as to the Section now under consideration.

The question as to the power of the Governor of New York, to approve bills after the adjournment of the legislature, went before the Supreme Court of that State in the case of the People vs. Bowen, 30 Barber R 24, when the right was sustained. The same case was taken to the Court of Appeals, and is reported in 21st N. Y. R 517, when it again underwent a very full consideration, and the power was again fully sustained.

The constitutional provision of the state of Louisiana is almost identical with that of Illinois. The supreme court of that state fully sustains the right of the governor to approve of bills after the adjournment of the legislature. State vs. Fagan, 22 Louisiana, An., 545.

We insist, therefore, that the construction, as placed upon the said constitutional provision by the governors of Illinois, is ***the true construction to be placed thereon***; that it is susceptible of none other, and that such executives committed no error in that regard; and even if they had, that the practice having so generally obtained, and been so universally acquiesced in, the courts would not at this late day set aside, or disturb the same.

The supreme court of Georgia, in passing upon this very question, say:

"On looking into the past history of our legislation *we find that it has been the practice, for many years, for the governor* to take five days *after the adjournment* of the general assembly, for the revision of bills passed by that body, and to approve and sign the same within that time; * *

* * * *and that a large number of the most important acts now "upon the statute books have been so approved and signed: which usage "and practice of the executive department of the state government should "not now, in our judgment, be disturbed or set aside.*

Soloman vs. The Commissioners, 41 Georgia, R 161.

In considering this question, it will doubtless occur to the court, that it is the practice at Washington for the president to approve bills, during the session of congress. It is proper, therefore, that we should refer to that practice for a moment. It is possible that the practice then, may have been taken, during the early part of the history of our country, from that of England, where the sovereign is considered to be, and is, a constituant part of the supreme law making power. 1 Blackston com. 261. In fact the King was not only the fountain of all justice, but of *all legislation*: Being a part of the law making power, he and Parliment, have always acted in concert in the passage of laws. Indeed the history of Parliment, shows that the ancient method of passing laws was by petition addressed to the King, by the house of commons, stating the substance of the proposed law, and if he approved, or granted the prayer of the petition, the bill was then put into form, and passed; and it was not until sometime during the latter part of the reign of Henry VI., when bills were reduced in the first instance into complete form of acts, and in that form came to the Sovereign for approval or rejection. Obviously then, the approval or consent of the King must be, and would be had during the sitting of Parliment. But be the origin of the practice, or the practice itself, at Washington what it may, we insist that it is *but a matter of practice;* and that each state, or government, or department thereof, has the right to determine what its practice shall be in matters of this character. Now, we do not wish to be understood as saying, or conceding that the President of the United States is a part of the law making power. We simply say, the English *practice* being well understood in this country, it would be very natural, at the commencement of our Governmental history for our chief executive to imitate the practice in the mother country; and in so doing, confine himself, in the approval of laws, to the time Congress is in actual session. Again the Supreme Court of New York in commenting upon this question, in the case of the The People vs. Bowen above refered to, in 30 Barb. on page 35, say:

"The practice at Washington has been, I believe for the President, not "to sign bills or resolutions after the adjournment of Congress, but the "practice of some of the Governors of this state has been different. How "long, or to what extent, it has been the practice for the Governors of this state to sign bills after the adjournment of the Legislature, I have not the "means of ascertaining; but it would appear that of the bills passed at the

"session of 1855, when the act in question was passed there were no less "than *fifty five*, that received the signature of the Governor after the adjourn- "ment of the Legislature."

(In the case at bar there were more than twelve hundred bills that received the signature of the Governor of Illinois after the adjournment of the Legislature, at which the act in question was passed.)

"And in view of the the magnitude of the interests involved, I should "hesitate to consider the practice at Washington as of controlling weight, "did I deem the question more doubtful than I think it to be, from the "constitutional provision itself. * * * Upon the whole I think the act "in question became a law, although signed by the Governor after the ad- "journment of the Legislature."

Again, the Court of Appeals of the same state, in commenting upon the same case in 21 N. Y. R. page 530, say:

"With regard to the practice of the President of the United States, and "the Governors of the several states, I believe the former has always signed "bills before the adjournment of Congress, and many of the latter are in "the habit of doing so after the adjournment of the Legislative bodies, "with whom they are respectively concerned. But so far as mere cus- "tom of practice can have any bearing on the question before us, I can "only say, *that the practice of the Supreme Executive of every govern- "ment in a matter of this kind, must be guided by the express or implied "language of the constitution under which he acts;* or in the absence of "any such guidance, by necessity or expediency. The President of the "United States is probably able without serious inconvenience, to examine "every bill before the adjournment of Congress; *at all events if this ques- "tion depended upon precedent, the practice which has obtained in our "state may surely be adduced against that of any other Government, and "should be considered controlling.*"

The foregoing places, as we think, the decision of the question we are considering, where it properly belongs, *with the Executives themselves.* That *it is but a matter of practice*; and that the courts will be guided by what *that practice* may have been in matters of this kind. And further that the *practice* which has obtained in the State of Illinois, may surely be adduced against that of any other Government, and should be considered as controlling in the case at bar. In commenting upon this subject, Judge Cooley, in his work on Constitutional Limitations, on page 69, says:

"Great deference has been paid, *in all cases*, to the action of the Execu- "tive departments, when its officers have been called upon, under the re- "sponsibilities of their official oaths, to inaugurate a new system, and when, "it is to be presumed, they have carefully and conscientiously weighed all "considerations, and endeavored to keep within the letter and spirit of the "constitution. If the question involved is really one of doubt, *the force of "their judgment especially in view of the injurious consequences that may "result from disregarding it, is fairly entitled to turnthe scale in the judi-*

"cial mind." In support of this doctrine he cites a long list of authorites; to which reference is hereby made.

By reference to the record, it will be seen that the provisions of the constitution of Illinois adopted in 1818, as incorporated into the record, is altogether different from the provision of the constitution of 1848, which we are now considering. Under the former, the Governor was not required to sign or approve bills at all; such duty seems to have been enjoined upon the Governor by the provisions of the latter constitution.

It will be noticed that there is no similarity whatever between these two constitutional provisions; they are entirely dissimilar. In fact, a *new system* in the enactment of laws was then inaugurated; that the proper procedure under it was a matter involved in doubt, this suit demonstrates; and that doubt, and system the Governors were called upon "under the responsibilities of their official oaths" to solve and construe; and that they, or very ~~many~~ Some of them, did construe such provisions, as giving them the power, legally, to approve bills after the adjournment of said Assembly, and that such practice did obtain to a very great extent, cannot and will not be questioned.

Again, we call the attention of the Court, particularly to the fact, that by the provisions of section 13 of said Act, (see record page 9,) the same was ordered to "take effect and be in force, from and after its passage;" and we insist, most respectively, that no good reason has been assigned by the learned counsel upon the other side, which contradicts that provision; or that any constitutional provision has been cited, which nullifies, or proves, or even tends to prove, that said Act was suspended in taking effect, or that it did not take effect as therein expressly provided, "from and after its passage;" or that makes it illegal, and a violation of the constitution for the Governor to approve bills after the adjournment of the Legislature.

Owing to the importance of this case, there is another point, which we submit, and to which we respectfully ask the consideration of the court; which if well taken, is as we think, equally decisive of the case at bar. May it not be a question, whether the Judiciary has the power to review the action of the Executive department of the Government in matters of this character? It is not necessarily implied in the constitutional enjoyment of every public official duty, where no express limitations exist, that the department, or the official must be the judge of the time and manner in which their duties shall be performed, having due regard to the nature and character of the duty, and the other duties of the office? And is it not true that where, by a constitution a particular question is addressed to the *discretion or judgment* of some one department, or officer, that the interference of any other department, or officer with a view to the substitution of its own discretion or judgment, is intrusive and unlawful? Under the constitution we are considering is it not true; that whether the Governor shall or shall not approve and sign a bill, at all, is a matter left wholly to his decretion? As before stated the constitution *does not restrict* the Governor, in the approval of bills, to the time the legislature was in session; nor fix a time within which he must make the necessary research

and consideration in the approval of a bill. He may occupy as much time as may be necessary for that purpose; but when he shall have decided to approve the bill, then, and not until then, is he required to sign it. The *time* therefore within which he should perform that function of his office, seems to have been left entirely to his *discretion*; and the *decision* of the question, whether he could sign bills, only during the session of the General Assembly was a matter, addressed to his *judgment*, in construing said constitutional provision, there being no express limitation in that regard. If this be true, does it not necessarily follow that in the exercise of such discretion and judgment of the Governor, his determination is *final, and not subject to review by the Judiciary;* or any other department of the "Government? "It follows, therefore, that every department of the Gov-"ernment, and every official of every department, *may at any time*, when "a duty is to be performed, be required to pass upon a question of constitu-"tional construction. * * * The first of these classes is where, by the "constitution, a particular question is plainly addressed to the discretion or "judgment of some one department, or officer, so that the interference of "any other department, or officer, with a view to the substitution of its "own discretion or judgment in the place of that to which the constitution "has confided the decision, would be impertinent and intrusive. Under "every constitution, cases of this description are to be met with; and though "it will sometimes be found difficult to classify them, there can be no "doubt, *when the case is properly determined to be one of this character. "that the rule must prevail wh ch m kes the decision final.*"

Cooley on Con. Lim. 41.

The point as made by Plaintiff in Error, touching the validity of the act in question, is in reality, nothing more or less, *an attack* upon the *judgment*, as well as the *discretion* of the Governor, as to the *manner* in which he performs the functions of his office, or department of government. The Governor who signed the Act in question, and Some several of the different Governors of the state, *did decide that they could, legally, sign and approve bills after the adjournment of the Generally Assembly.* That they were *compelled to*, and of themselves *had the right* to construe said constitutional provisions, is beyond question; it relates to the performance of the functions of their office; no other department of the state government could, or had the right, under said constitution, to decide, that question for them; or to review, revise their decission when made; or to control them in any way, in the discharge of their official duties; the courts could neither compell, or restrain the executive in matters appertaining to his official duties or conduct. The People &c., vs. Bissell, 19 Ill. R. 229. That said constitutional provision was the subject of, and open to construction must be conceded. Let it be remembered that *the substance of the act, neither in whole or in part, is assailed or pretended to be, in conflict with the constitution. The whole objection as made. is leveled at the propriety, as to the time of the performance of an official duty by the Governor; not its non performance.*

In conclusion, we would most respectfully recall the attention of the

court to the following points as made, which are, as we believe, decisive of the case, viz: That IF *it be true*, as claimed, that the approval as made of the Act in question *be void*; then, in order that the same should become a law, as claimed by Counsel for Plaintiff in Error, at the meeting of the next ensuing General Assembly, IT MUST HAVE BEEN AUTHENTICATED *by the Secretary of State* in the manner *as provided by law*; this, not having been done, the bill never became a law; that the theory of the other side, would if adopted absolutely destroy, *thousands of laws*, now upon the statute books of Illinois, the consequence of which would be serious in the extreme; further, that said constitutional provision is susceptible of and has received a different, and a practical, or contemporaneous construction; and we have endeavored to show that such construction is correct; if not, that the consequences of adopting a different one, will now be too destructive to disturb; that the act in question was in fact duly, and regularly passed by the senate and house of representatives; was signed and approved by the Governor of the state; that it did receive the concurrence of the whole law-making power of the state of Illinois, and did, by the provisions of the 13th, or last section thereof, become a law, and did take effect and was in force from and after its passage.

It was duly filed, as a law, with the secretary of state; was published as a law, among the laws of the state; has been relied upon, and treated as a law, and large amounts of money been expended upon the faith of its being a law; and its legality and validity has never in a single instance been called in question, from the time of its passage down to the trial of this case in the court below. We respectfully insist that the said act should not now be disturbed: the long-continued, and continuing practice of the executive of said state overturned, the rights subverted, and the untold damage inflicted, which would and must inevitably result by declaring void this, and the thousands of laws of the state of Illinois, now hanging on the decision of this honorable court in the case at bar. It is with every confidence that the judgment of the court below will be affirmed, that we submit this case.

The importance of the case, to the defendant in error, as well as to the people of the state of Illinois and others, is our apology for the length of this argument.

D. T. McINTYRE.
Attorney for Defendant in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 273.

THE ST. JOSEPH & DENVER CITY RAILROAD COMPANY, WILLIAM BOND, RECEIVER, PLAINTIFF IN ERROR,

vs.

MATTHEW BALDWIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED OCTOBER 15, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 273.

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1 Supreme court of the State of Nebraska. April term, 1878.

THE SAINT JOE AND DENVER RAILROAD COMpany and others, plaintiffs in error,
v.
MATTHEW F. BALDWIN, DEFENDANT IN ERROR.

Be it remembered that at a term of the supreme court of the State of Nebraska, begun and held in Lincoln, Nebraska, on Tuesday, the second day of April, 1878—present, Hon. Daniel Gantt, chief justice; Hon. Samuel Maxwell, Hon. George B. Lake, judges; Guy A. Brown, clerk & reporter, the following proceedings were had and done in the above-entitled cause.

On the 4th day of April the petition in error of said plaintiffs in error and a transcript of the record of the district court was filed with the clerk of said court, in the words and figures following, to wit:

2 *Petition in error.*

In the supreme court of Nebraska.

M. BALDWIN, DEFENDANT IN ERROR,
v.
ST. JOS. & DENVER CITY R. R. CO. & ALS., pl't'ffs in error.

Plaintiffs in error, who were the defendants in the district court of Jefferson County, in which M. Baldwin was plaintiff and the St. Jo. & D. C. R. R. Co., W'm Band, receiver of said co., and Forrest, Johnson, & McCook were def'ts, show to the honorable the supreme court of the State of Nebraska that a judgment was rendered in the district court for Jefferson County, Nebr., in November, 1877, in the above cause of M. Baldwin vs. St. Jo. & D. C. R. R. Co. & als, which is & still stands of record & unreversed in said court, and which judgment is of manifest error, and for which reasons the said plaintiffs in error, as petitioners, pray your honors to reverse, set aside, & annul, & declare for naught the same, & for reasons state:

1. The judgment was for the wrong party & should have been for the defendant in the district court.
2. Because the said judgment was against the law.
3. Because the question at issue below was the construction of the act of Congress of July 23d, 1866, & which fully granted the right of way to the St. Jo. & D. C. R. R. Co., over the land claimed for in the petition.

3 4. Because the face of the papers show that plaintiff below had no substantial right of action.

5. Because said judgment is erroneous and should be reversed.

DONIPHAN & REED,
Att'ys for Def'ts.

Summons in error waived.

E. E. BROWN,
Att'y for Def't in error.

(Endorsed:) No. 10. M. Baldwin vs. St. Jo. & D. C. R. R. Co. & als. Petition in error. Filed Apr. 14, 1878. Guy A. Brown, clerk.

REC. 273—1

4 *Transcript of district court.*

STATE OF NEBRASKA,
County of Jefferson, ss:

Pleas before the district court, first judicial district of Nebraska, at a term begun and holden in the county of Jefferson, on the 13th day of September, A. D. 1876, before the Hon. A. J. Weaver, judge of the first judicial district of the State of Nebraska.

MATHEW F. BALDWIN, PLAINTIFF,
against
THE ST. JOSEPH AND DENVER CITY RAILROAD Co., defendants.

Be it remembered that heretofore, to wit, on the 3 day of September, A. D. 1875, a petition was filed in the office of the clerk of the district court, in and for the county of Jefferson, in the words and figures following, to wit:

5 *Petition.*

In the district court of Jefferson County, first judicial district of the State of Nebraska.

MATHEW F. BALDWIN, PLAINTIFF,
against
THE ST. JOSEPH AND DENVER CITY RAILROAD Company, defendants.

The plaintiff says:

1st. That on the 27th day of October, 1869, he became the owner in fee simple of the following described lands, to wit: The southeast quarter (¼) of the southeast quarter (¼) and the northwest quarter (¼) of the southeast quarter (¼) of section number eleven (11) in town one (1), range three (3), Jefferson County, State of Nebraska, and has been the owner in fee simple of said described lands ever since the said 27th day of October, 1869.

2nd. That on or about the 1st day of October, 1871, the said defendant, in the course of the construction of its railroad, entered upon the above described lands and built thereon the track of its said railroad, claiming the right of way over said lands a distance of one hundred feet wide on each side of said railroad track and entirely across said lands, a distance of two hundred rods, and occupying the same to the exclusion of plaintiff, and said defendant has ever since and does now continue to occupy the same to plaintiff's entire exclusion without the permission or consent of plaintiff, and without having the right of way and the damages to plaintiff's land ascertained and awarded to
6 plaintiff, as provided by the laws of the State of Nebraska.

3rd. This action is brought into this court on the appeal of the defendant from the assessment of the damages sustained by this plaintiff by reason of the location of the said railroad over said lands of plaintiff, which assessment was made by commissioners appointed for that purpose on the application of plaintiff, as provided by chapter eleven (11), entitled "corporations," of the general statutes of the State of Nebraska.

4th. The plaintiff has sustained damages by reason of the location of

this said railroad track over the said lands of plaintiff, and the appropriating, digging, and injuring of said lands, and dividing said lands into inconvenient and badly-shaped parcels, and other injuries to the said lands of plaintiff in the amount of five hundred dollars, his damages so as aforesaid sustained; plaintiff demands judgment, together with his costs herein expended.

SLOCUM & HAMBEL,
Attorneys for Plaintiff.

STATE OF NEBRASKA,
County of Jefferson, ss:

Mathew F. Baldwin, being first duly sworn, on oath says that he is the plaintiff in the foregoing action, that he has heard read the foregoing petition, and that the allegations therein contained are true.

MATHEW FINCH BALDWIN.

Sworn to before me and signed in my presence this 2nd day of September, 1875.

[SEAL.]

DAVID C. WORK,
Clerk of the Court.

7 And afterwards, to wit, on the 29th day of June, A. D. 1876, there was filed in the office of said clerk an answer in the words and figures following, to wit:

Answer.

In district court.

STATE OF NEBRASKA:

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD Co. & J. Augustus Johnson, John J. McCook, and George J. Forest.

The said defendants, in answer to the petition of plaintiff, say that it is not true that on the 27th day of October, 1869, plaintiff became the owner of the land mentioned in his petition, or that he is now the owner in fee simple of the same.

Defendants admit that in October, 1871, the St. Joseph & Denver City Railroad was constructed and has ever since been operated through Jefferson County, Nebraska, but deny that the same was constructed over and across the land of said plaintiff or the land as described in said petition; and they deny that they use or occupy the whole width of 200 feet or more than 25 feet at any point in section 11, town 1, range 3 east, or that they have or do exclude plaintiff from any land except said railroad track; they further deny that he is damaged $500 or any other sum by any action of theirs; and they deny each and every allegation in plaintiff's petition contained not herein specifically admitted.

8 2ND DEFENCE.—For further answer and defence defendants say that the St. Joseph & Denver City Railroad Co. was duly organized under the laws of the State of Kansas in the year 1862; and that, by an act of Congress approved July 23rd, 1866, entitled "An act for a

grant of lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad and telegraph," the odd sections of land for ten miles in north lying in the then Territory of Nebraska were granted to said railroad company to construct its road from Marysville, in Kansas, to effect a junction with the Union Pacific Railroad at, point not further west than the 100th meridian of west longitude. That said grant was accepted and the land duly surveyed by said company in the years 1867 & 1868, and was located upon its present route about the first of January, 1867, and maps of the same filed in the Land Office of the United States and approved by the President of the United States on the 21st day of March, 1870. That by said act the right of way was granted to the said company 200 feet wide through all the public lands lying in the Territory of Nebraska through which the said road might pass. That at the date of the passage of said act the land mentioned by plaintiff in his petition was vacant land belonging to the United States, and was held neither by homestead or pre-'mption but was subject to the grant of such right of way from that date, both as being such public land and as being a part of such odd section which could
9 only be pre-empted or homesteaded at any time after said act passed subject to such right of way.

Defendants further state that on the 14th day of May, 1870, the St. Joseph and Denver City Railroad Company, by its deed of mortgage, duly recorded in Jefferson County, Nebraska, of date June, 1870, conveyed its road-bed, right of way, franchises, and its entire property in the State of Nebraska to the Farmers' Loan and Trust Company, to secure $5,500,000.00 of its bonds, and that in default of payment thereof the said mortgage was foreclosed by the circuit court of the United States for the district of Nebraska, at the May term, 1875, and sold to the defendants Johnson, McCook, & Forest, at Speed City, in said county, and the sale to them confirmed by said court on the 3rd day of May, A. D. 1876, by which they took the said property, right of way, and franchises, and are now holding and operating the said road under the said grant of Congress aforesaid, and defendants claim that by said act an absolute right of way 200 feet in width was granted to said company through all public lands when the road should be built. And they say that the plaintiff is not entitled to recover from them anything for such right of way; that the St. Joseph and Denver City Railroad Company has ceased to exist as a corporation, only to close up its business under the decree of foreclosure aforesaid, and the above-named other defendants are representing all the parties in interest adverse to plaintiff, and they asked to be dismissed with their costs.

JOHN SAXON AND
DONIPHAN & REED,
For Defendants.

10 THE STATE OF NEBRASKA,
Jefferson County, ss:

John Saxon, being duly sworn, says he is the agent and attorney of said defendants, duly authorized in the premises; that said defendants are now residents of the State of Nebraska, and that he believes the facts stated in their above answer are true.

JOHN SAXON.

Subscribed and sworn to before me this 29th day of June, A. D. 1876.

[SEAL.] DAVID C. WORK,
Clerk.

And afterwards, to wit, on the 30th day of June, 1877, there was filed in the office of said clerk a reply, in the words and figures following, to wit:

Reply.

In the district court of the first judicial district of Nebraska, in and for Jefferson County.

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD Company and J. Augustus Johnson, John J. McCook & George J. Forest.

The said plaintiff, for reply to the second defence in defendants' answer contained, avers and says:

1st. He admits that the said defendants' railroad company was duly organized under the laws of the State of Kansas, in the year 1862;

11 that on the 23 day of July, 1866, the said lands mentioned in plaintiff's petition were the lands of the United States Government, and that the said defendants' railroad company mortgaged the land mentioned in defendants' answer, and that the same were sold to the defendants Johnson, Forest, and McCook.

2nd. He alleges that said act of Congress of July 23rd, 1866, did not convey or grant to said defendants' railroad company any right of way over the said lands of plaintiff; that said grant by said act of Congress did not convey to defendants' railroad company any lands or right of way in the State of Nebraska; that the line of said railroad company was not located over the lands of plaintiff until the year 1871; that plaintiff was the owner of the lands mentioned in his petition prior to the time when said railroad company's line was located over the same, and prior to the time when, if ever, the said railroad company was authorized to locate its line over said lands, and that the sale mentioned in said second defense does not prevent or preclude plaintiff from recovering his damages sustained by reason of the location and construction of said railroad over plaintiff's said lands.

3rd. He denies each and every allegation in said defendants' answer contained not hereinbefore specifically admitted or denied.

SLOCUM AND HAMBEL.
Plaintiff's Counsel.

12 STATE OF NEBRASKA,
Jefferson County, ss:

Mathew F. Baldwin, being first duly sworn, says he is plaintiff in the above-entitled action, and that the facts stated in the foregoing reply are true, as he verily believes.

Sworn to before me and signed in my presence this day of June, 1877.

And afterwards to wit, on the 13th day of September, A. D. 1866, it being the first day of the September term of said court, there was filed in open court stipulations for continuance in the words and figures following, to wit:

Stipulations.

In the district court of the first judicial district of Nebraska in and for Jefferson County.

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD Company and J. Augustus Johnson, John J. McCook & George J. Forest.

Stipulation for continuance and place of trial of this and other cases.

It is hereby expressly stipulated and agreed by and between the respective attorneys for the parties to the above-entitled action that this cause shall be continued to the next term of this court.

And it is further expressly and solemnly agreed by and between said attorneys that this cause shall be tried in the State courts, and shall not be transferred to the United States court unless after
13 being heard in the supreme court of the State. It is desired to then transfer said cause from said supreme court to the Supreme Court of the United States.

And it is further expressly stipulated and agreed, that all of the above stipulations and agreements shall extend to and be binding in and upon the parties hereto in the cases of the following-named plaintiffs against the same defendants, to wit: James Harris, Abner M. Watkins, Eli Goldsberry, William F. Browner, Samuel Goldsberry, Mathew F. Baldwin, Congrere C. Callorray, Benjamin F. Hebrey, Margret Letsmeyer, Julius McCandlass, et al., Thomas A. Beaty, Avon Wells, and James B. Mattingly; said cases now numbered on the appearance docket of said court as 138, 138[a], 138[b], 138[c], 138[d], 138[f], 138[g], 138[h], 138[i], 138[j], 138[k], 195[l].

Signed this 13th day of September, 1876.

SLOCUM & HAMBEL,
W. AND H. ASHBY,
Attorneys for Plaintiff.

JOHN SAXON,
JOHN DONIPHAN,
Attorneys for Defendants.

MATHEW F. BALDWIN
vs.
ST. JOSEPH & DENVER CITY RAILROAD Company.

SEPTEMBER 13*th*, 1876.

And now, on this 13th day of September, 1876, this cause came on for hearing, and the same is continued as per stipulations on file,
14 said cause to stand dismissed at the expiration of thirty days, unless commencement fees be paid within that time.

And afterwards, to wit, on the 17th day of May, A. D. 1877, it being the fourth day of the May term of the said court, the said plaintiff filed the following demurrer to be second cause of defence in the answer of the said defendants, to wit:

Demurrer.

In the district court of Jefferson County, first judicial district of Nebraska.

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD Company et al.

And now comes the plaintiff and demurers to the second defense contained in defendant's answer and for cause says that the facts set forth therein does not constitute a ground of defense to plaintiff's petition.

MATHEW F. BALDWIN,
Plaintiff,
By W. B. GREGGS, SLOCUM & HAMBEL,
His Attorneys.

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD Company.

THURSDAY, *May 17th*, 1877.

And now on this 13th day of May, 1877, this cause came on to be heard upon the demurrer to second cause of defense on the answer filed herein, and the court having considered the same and being fully
15 advised in the premises doth overrule said demurrer; to which ruling of the court the plaintiff then and there duly excepted, and leave is given plaintiff to reply within thirty days from this date.

And afterwards, to wit, on the 30th day of June, A. D. 1877, there was filed in the office of the clerk of said court a reply in the words and figures following, to wit:

Reply.

In the district court of the first judicial district of Nebraska in and for Jefferson County.

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD Company et al.

The said plaintiff, for reply to the second defence in defendants' answer contained, avers and says:

1st. He admits that the said defendants' railroad company was duly organized under the laws of the State of Kansas in the year 1862; that on the 23rd day of July, 1866, the said lands mentioned in plaintiff's petition were the lands of the United States Government, and that the said defendants' railroad company mortgaged the land mentioned in defendants' answer, and that the same were sold to the defendants, Johnson, Forest & McCook.

2nd. He alleges that said act of Congress of July 23rd, 1866, did not

convey or grant to said defendants' railroad company any right of way over the said lands of plaintiff; that said grant by said act
16 of Congress did not convey to defendants' railroad company any lands or right of way in the State of Nebraska; that the line of said railroad company was not located over the lands of plaintiff until in the year 1871. That plaintiff was the owner of the land mentioned in his petition prior to the time when said railroad company's line was located over the same, and prior to the time when, if ever, the said railroad company was authorized to locate its line over said land, and that the sale mentioned in said second defense does not prevent or preclude plaintiff from recovering his damages sustained by reason of the location and construction of said railroad over plaintiff's said lands. He denies each and every allegation in said defendant's answer contained not hereinbefore specifically admitted or denied.

SLOCUM & HAMBEL,
Plaintiff's Counsel.

STATE OF NEBRASKA,
Jefferson County, ss:

Mathew F. Baldwin, being first duly sworn, says he is plaintiff in the above entitled action, and that the facts stated in the foregoing reply are true as he verily believes.

MATHEW F. BALDWIN.

Sworn to before me and signed in my presence this 30th day of June, 1877.

[SEAL.] DAVID C. WORK.
Clerk.

17 And afterwards, to wit, on the 14th day of November, 1877, it being the first day of the November term of said court, there was filed in court by said defendants a motion for judgment on the pleadings in the words and figures following, to wit:

In the district court of Jefferson County, November term, 1877.

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH AND DENVER CITY RAILROAD Company, A. Forest, et al.

Now comes the above named defendants and move the court for judgement in their favor, on the pleading herein, on the following grounds:

1st. That the answer herein by them filed constitutes a complete and perfect defence to plaintiff's alleged cause of action.

2nd. That the reply herein filed by plaintiff constitutes no defense of or to the new matter set up in defendants' answer.

JOHN SAXON &
DONIPHAN & REED,
Defendants' Attorneys.

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD Co.

TUESDAY, *November 15th*, 1877.

18 And now, on this 15th day of November, A. D. 1877, this

cause came on for hearing, upon the motion of the defendants by there attorneys, Saxon & Reed, for judgement, in their favor, on the pleadings, and, after argument by counsel, is submitted to the court; and the court having considered the same, and being fully advised in the premises, doth overrule said motion; to which ruling of the court defendants, by their attorneys, then and there duly excepted.

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD, G. A. Forest, J. A. Johnson, & J. McCook.

WEDNESDAY, *November 21st*, 1877.

And now, on the 21st day of November, it being one of the days of the November term of said court, this cause comeing on further to be heard, and a jury being waived, was submitted to the court upon the pleadings and evidence, and the court having considered the same and being fully advised in the premises, find the issues for the plaintiff, and assess his damages at two hundred dollars.

It is therefore considered, ordered, and adjudged by the court that the said plaintiff, Mathew F. Baldwin, have and recover of the said defendants, the St. Joseph & Denver City Railroad Company, G. A. Forest,
19 J. A. Johnson, and J. McCook, the said sum of *of* two hundred dollars, and his costs herein expended at $61.53. And thereupon comes the defendants by there attorneys, Saxon & Doniphan & Reed, and moves the court for a new trial; and the court having considered the same and being fully advised in the premises doth overrule said motion; to which ruling of the court defendants duly excepted, and leave is granted to defendants to present there bill of exceptions within 40 days from this date.

And afterwards, to wit, on the 22 day of December, A. D. 1877, there was filed by the said defendants there bill of exceptions in the words and figures following to wit:

Bill of exceptions.

In district court, Jefferson County, Nebraska.

THE STATE OF NEBRASKA, MATHEW F. BALDWIN
vs.
THE ST. JOSEPH AND DENVER CITY RAILROAD Company, G. A. Forest, et als.

Be it remembered that, at the Nouember term of said court, A. D. 1877, and on the 15 day of November, A. D. 1877, this cause comeing on for hearing upon the motion of said defendants for judgement, in there favor, on the pleadings; which said motion is in the words and figures following, to wit:

In the district court of Jefferson County, Nebraska, November term, 1877.

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD Company, G. A. Forest, et als.

20 Now comes the above named defendants and moves the court

for judgement, in there favor, on the pleadings herein, on the following grounds.

1st. That the answer by them herein filed constitutes a complete and perfect defense to plaintiff's alledged cause of action.

2nd. That the reply herein filed by plaintiff constitutes no avoidance or defense of or to the new matter set up in defendants' answer.

JOHN SAXON &
DONIPHAN AND REED,
Defendants' Attorneys.

Therefore, the court having examined the same, heard the arguments of counsel, and being fully advised in the premises, overruled the said motion; to which ruleing the defendants then and there excepted.

And be it further remembered that afterwards, on the 21st day of November, this cause came on for trial before the court, a jury being waived, and thereupon the court, being fully advised in the premises, did find the issues joined for the plaintiff, and did assess his damages at $200.00 dollars.

And be it further remembered, that afterward, on the same day, the said defendants moved the court for a new trial; which said motion is in the words and figures following, to wit:

Motion.

In district court, Jefferson Co., Nebraska.

THE STATE OF NEBRASKA, MATHEW F. BALDWIN,
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD COMPANY, J. A. Forest, et al.

21 The defendant moves the court for a new trial in this cause, and for cause says:

First. That the verdict and decision is not sustained by sufficient evidence, and is contrary to law.

Second. That there was no error of law occur'ing at the trial and excepted to by these defendants.

SAXON, DONIPHAN & REED,
For Defendants.

Which said motion was overruled; to which ruleing defendants then and there excepted and asked that this there bill of exceptions be settled, signed, and made a part of the record in this cause; which is accordingly done.

A. J. WEAVER, *Judge.*

The above bill of exceptions having been submitted, the same is agreed to and settled this 22nd day of December, A. D. 1877.

SLOCUM & HAMBEL,
Attorneys for Plaintiff.

MATHEW F. BALDWIN
vs.
THE ST. JOSEPH & DENVER CITY RAILROAD, G. A. Forest, J. A. Johnson, and J. McCook.

And now comes the defendants in the above-entitled cause by there attorneys. Saxon, Doniphan & Reed, and present there bill of ex-
22 ceptions and ask that the same be settled, signed, and made a part of the record in this cause, which is accordingly done.

STATE OF NEBRASKA,
County of Jefferson, ss:

I, J. R. Nelson, county clerk and ex-officio clerk of the district court in and for the county and State aforesaid, do hereby certify that the foregoing transcript is a true and correct copy of the records and files in this office pertaining to the above-entitled cause.

As witness my hand and seal officially this 21st day of January, A. D. 1878.

[SEAL.] J. R. NELSON, *Clerk.*

NOTE.—And afterwards, to wit, on the 16th day of April, 1878, being one of the days of the April term of said supreme court, the following proceedings were had and done in said cause.

ST. JOE & DENVER R. R. AND OTHERS
vs.
MATTHEW F. BALDWIN.

This cause came on to be heard upon the petition in error of the Saint Joe & Denver R. R. and others, plaintiffs in error, to reverse
23 a judgment of the district court for Jefferson County, and the same was submitted on briefs of the respective counsel. Upon mature consideration thereof, and of the act of Congress of July 23, 1866, granting to the State of Kansas lands for the use and benefit of plaintiffs, it is considered by the court that the plaintiff in error was not entitled to any right of way for its said railroad track over lands of defendant in error, under said act of Congress, and the defendant in error is justly entitled to damages for right of way taken by said plaintiff in error over lands of defendant in error, as found by the court below, and its judgment is hereby affirmed at costs of plaintiff in error, taxed at $6.15; to all of which plaintiffs in error excepted.

And on the same day, to wit, the 16th of April, 1878, the following opinion in said cause was filed with the clerk of said court and entered of record therein.

24 *Opinion.—Filed April* 11, 1878.

Supreme court, State of Nebraska.

THE ST. JOSEPH & DENVER CITY RAILROAD Company
v.
MATHEW F. BALDWIN.

MAXWELL, J.

On the 23d day of January, 1866, Congress passed "an act for a grant

of lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad Company."

Section 1 of the act provides "that there is hereby granted to the State of Kansas, for the use and benefit of the Saint Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of Kansas, to construct and operate a railroad from Elwood, in Kansas, westwardly, via Maryville, in the same State, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one-hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or home-
25 stead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the tier of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid," etc.

Section 4 provides "that as soon as the said company shall file with the Secretary of the Interior maps of its lines designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act, and subserve the public interest."

Section 6 provides "that the right of way through the public lands be, and the same is hereby, granted to Saint Joseph and Denver City Railroad Company, its successors and assigns, for the construction of a railroad as proposed," etc.

On the 27th day of October, 1869, the defendant purchased from the United States the southeast quarter of the southeast quarter, and
26 the northwest quarter of the southeast quarter of section 11, in township 1, range 3, in Jefferson County, and has continued to own said lands ever since.

In the year 1871 the plaintiff located its line of road over the above described lands, taking as trip through the same about two hundred rods in length and two hundred feet in width. The defendant took the necessary steps under the laws of this State to have the damages assessed and an award was made in his favor. On appeal from the award to the district court, he recovered judgment for the sum of $200.00. The case is brought into this court by petition in error.

The railroad company set up as a defense that, by the act of Congress, approved July 23, 1866, they were granted the right of way through the public lands of the United States, and they insist that this was a grant in presenti, which took effect without regard to the location of their line, and that therefore all lands sold by the United States after the passage of the act, and before the location of the road, although sold without reserve and for full consideration, were taken subject to this grant. No such construction can be given to the act. Construing its provisions together, it is apparent that the right of way was granted only
27 across such lands as were owned by the United States at the time of the location of the line of the road. The plaintiff might

with equal propriety insist that they were entitled to all the odd numbered sections for ten miles on each side of the road, although the same had been entered prior to the location of the line. Such lands were subject to entry and settlement until the plaintiff had filed maps of its line, designating the route with the Secretary of the Interior, and the lands had been withdrawn from market under the provisions of section 4 of the act.

A party purchasing agricultural lands from the United States, without reservation or condition, takes the entire title to the same. He acquires a right of title therein of which he can be divested only for public use and on just compensation being made for the same.

As the defendant herein was the owner of the lands in controversy at the time of the location of plaintiff's line across the same, he is entitled to damages for the right of way.

The judgment of the district court is therefore affirmed.

STATE OF NEBRASKA, *ss:*

I, Guy A. Brown, clerk of the supreme court, do hereby certify that the above is a true, correct, and complete copy of the petition in error, transcript, judgment, and opinion of the court, & bond on appeal to Supreme Court in the cause therein entitled as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and the seal of said court this 30th day of April, A. D. 1878.

[SEAL.] GUY A. BROWN, *Clerk.*

Fees for transcript, $7.50.

28 In the Supreme Court of the United States.

Know all men by these presents, that we, the Saint Joseph and Denver City Railroad Company and William Bond, receiver of the Saint Joseph and Denver City Railroad Company, A. M. Saxton, L. C. Champlin, and H. Smith, of Saint Joseph, Missouri, and of Jefferson County, Nebraska, are firmly bound unto Matthew Baldwin, of Jefferson County, Nebraska, in the sum of five hundred dollars, to be paid to the said Matthew Baldwin, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our & each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this second day of May, A. D. 1878.

Whereas the above-bound, the Saint Joseph & Denver City Railroad Company and William Bond, receiver of the Saint Joseph & Denver City Railroad Company, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of Nebraska at the April term, 1878, in the case of Matthew Baldwin against The Saint Joseph & Denver
29 City Railroad Company & als., defendants:

Now, therefore, the condition of this obligation is such that if the above-bound the Saint Joseph & Denver City Railroad Company & als. shall prosecute the said writ of error to effect and answer all costs

and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

THE SAINT JOSEPH & DENVER CITY RAILROAD, [SEAL.]
By L. D. TUTHILL,
General Manager.
W'M BOND, *Receiver*, [SEAL.]
P'r JNO. DONIPHAN, [SEAL.]
His Attorney.
J. H. SMITH. [SEAL.]
L. C. CHAMPLIN. [SEAL.]
A. M. SAXTON. [SEAL.]

Approved this May 7th, 1878.

DANIEL GANTT,
Chief Justice Sup. Court of Nebraska.

STATE OF MISSOURI,
County of Buchanan, ss:

Before me, the undersigned, a notary public within & for the county & State above written, personally appeared A. M. Saxton, who is to me well known, and stated on oath he executed the above bond, & that he is worth, over & above his indebtedness & exemptions by law, the sum of five hundred dollars in personal and real property, subject to execution in Missouri and Kansas.

A. M. SAXTON.

30 Subscribed and sworn to before me 6th day of May, 1878.
[SEAL.] JAS. F. PITT,
Notary Public.

THE STATE OF NEBRASKA,
County of Jefferson, ss:

Before me the undersigned, a notary public within and for the said county and State, personally appeared L. C. Champlin & J. H. Smith, who are to me well known, and stated on oath that they executed the above written bond, and that they are individually worth over and above his indebtedness and exemptions by law the sum of five hundred dollars in personal and real property subject to execution in the State of Nebraska.

L. C. CHAMPLIN.
J. H. SMITH.

Subscribed and sworn to before me this second day of May, A. D. 1878.
[SEAL.] C. H. FRUEN,
Notary Public.

STATE OF NEBRASKA:

In the supreme court of Nebraska.

I do hereby certify that the above and foregoing bond is good & sufficient and the parties entirely responsible.

GUY A. BROWN,
Clerk Supreme Court.

(Endorsed:) Matthew F. Baldwin v. St. Joe & Denver R. R. Bond on appeal to Supreme Court. Supreme court Nebraska. Filed May 7, 1878. Guy A. Brown, clerk.

30½ (Indorsed:) Saint Joe & Denver R. R. v. Matthew F. Baldwin. Transcript from the supreme court of Nebraska.

31 THE UNITED STATES OF AMERICA,
State of Nebraska, ss:

To Matthew Baldwin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October, 1878, pursuant to a writ of error, filed in the clerk's *of* office of the supreme court of the State of Nebraska (it being a court of the last resort in said State), wherein the Saint Joseph and Denver City Railroad Company and William Bond, receiver of the Saint Joseph and Denver City Railroad Company & als. are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Daniel Gantt, chief justice of the supreme court of the State of Nebraska, this first day of May, in the year of our Lord one thousand eight hundred & seventy-eight.

DANIEL GANTT,
Chief Justice Supreme Court State of Nebraska.

32 I hereby accept service of the within and foregoing citation made upon me, this May 1st, 1878, and waive time, and consent the same may be heard as of this date.

E. E. BROWN,
Att'y for Pl'ff.

(Indorsed:) The St. Joseph & Denver City R. R. Co. & als. vs. Matthew Baldwin. Citation. Supreme court Nebraska. Filed May 2, 1878. Guy A. Brown, clerk.

33 In the Supreme Court of the United States, of the October term, one thousand eight hundred and seventy-eight.

THE SAINT JOSEPH & DENVER CITY R. ROAD Co. & als., p. error,
vs.
MATTHEW T. BALDWIN, DEF'T IN ERROR.

Afterwards, to wit, on the first Monday in October, in the same term, before the justices in the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the Saint Joseph & Denver City Railroad Company, Wm. Bond, receiver of the said company, & als., by their attorneys, Doniphan & Reed, and say, that in the record and proceedings aforesaid, there is manifest error in this, to wit, the supreme court of Nebraska erred in deciding and adjudging that the plaintiffs in error were not entitled to take any right of way for their railroad track in Nebraska by the act of Congress of July 23, 1866, granting lands to the State of Kansas and in rendering & adjudging damages against the plaintiffs in error for the right of way used by their road in said State, when the same was granted them by the said act of Congress. And the said Saint Joseph & Denver City R. R. Co. & als. pray that the judgment aforesaid may be reversed, annul'ed, and altogether held for nought, and that they be restored to all things they have lost by occasion of the said judgment.

DONIPHAN & REED,
Att'ys for Plaintiffs in Error.

34 In the Supreme Court of the United States.

THE SAINT JOSEPH & DENVER CITY RAILroad Company & als.
vs.
MATTHEW T. BALDWIN.

An' afterwards, to wit, on the first Monday in October, for the October term, one thousand eight hundred & seventy-eight, the said Matthew T. Baldwin, by E. E. Brown, his attorney, freely comes here into court and says there is no error, neither in the record or proceedings aforesaid, or in giving of the judgment aforesaid, and he prays that the said Supreme Court of judicature, before the justices thereof, now here, may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error; and that the judgmen t aforesaid, in form aforesaid given, may in all things be affirmed.

E. E. BROWN,
Att'y for Defendant in Error.

(Indorsed:) St. Jo. & D. C. R. R. Co. & als., p. e., v. Matthew T. Baldwin, d. e. Joinder, errors.

35 UNITED STATES OF AMERICA:

The President of the United States to the honorable judges and clerk of the supreme court of the State of Nebraska, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said *court of the* supreme court of the State of Nebraska, before you or some of you, being the highest court of law or equity in the said State in which a decision could be rendered, in the suit between the St. Joseph and Denver City Railroad Company, William Bond, receiver of the St. Joseph & Denver City Railroad Company, et al., plaintiffs in error to the State court, against Matthew Baldwin, defendant in error, a title to the right of way of the St. Joseph and Denver City Railroad Company over real estate in Jefferson County, Nebraska, was claimed under an act of Congress approved July 23, 1866, and the decision of the supreme court of the State of Nebraska was against the title claimed under said act, a manifest error hath, happened, to the great damage of the plaintiff in error, The St. Joseph & Denver City Railroad Company et al., as by their complaint appears: and being willing that the error, if any hath been, should
36 be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday in October next, in the said Supreme Court to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Daniel Gantt, chief justice of the said supreme court of the State of Nebraska, this first day of May, A. D. 1878.

DANIEL GANTT,
Chief Justice of Supreme Court, State of Nebraska.

Attest:
[SEAL.]

GUY A. BROWN,
Clerk Supreme Court.

(Indorsed:) Saint Joe & Denver R. R. v. Matthew F. Baldwin. Writ of error.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the St. Joseph and Denver City Railroad Company, William Bond, receiver, plaintiff in error, and Matthew Baldwin, defendant in error, wherein was drawn in question the validty of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States,
38 and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said St. Joseph and Denver City Railroad Company, William Bond, receiver, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the day of , in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.]

WATSON B. SMITH,
Clerk of the Circuit Court of the United States for the District of Nebraska.

Allowed by—

SAMUEL MAXWELL,
Ch. J. Sup. Court of Nebraska.

(Indorsement on cover:) No. 273. The St. Joseph and Denver City Railroad Company, William Bond, receiver, plaintiff in error, vs. Matthew Baldwin. Nebraska sup. court. Filed 15th October, 1878.

REC. 273—2

SUPREME COURT OF THE UNITED STATES.

No. 273.

THE ST. JOSEPH AND DENVER CITY RAILROAD COMPANY, WILLIAM BOND, RECEIVER, PLAINTIFF IN ERROR,

vs.

MATTHEW BALDWIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

DONIPHAN & REED, Att'ys,
With Hon. JOHN F. DILLON, of Counsel.

Supreme Court of the United States.

THE ST. JOSEPH & DENVER CITY RAILROAD COMPANY, et al., Plaintiff in Error,

vs.

MATTHEW BALDWIN.

STATEMENT OF CASE.

The above named defendant in error, together with several other persons owning land in Jefferson County, Nebraska, made application to the Probate Court of said county, under Section 97 of Chapter 11 of the General Statutes of said State, for the appointment of commissioners to assess damages they claimed to have sustained on account of a strip taken by the said railroad company for a right of way over their said lands. Commissioners were appointed under that section, who finally reported to said court damages in favor of those uniting in said proceedings. From that assessment of damages the said railroad company appealed to the District Court of said Jefferson County, in which the several land-owners filed separate petitions. The petition of this defendant in error contained the usual averments in actions of this kind.

The answer therein set up specially, that the St. Joseph & Denver City Railroad Company was duly organized under the laws of the State of Kansas, in the year 1862, and that by an act of Congress, approved July 23, 1866, entitled "An act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph," the right of way 200 feet wide was granted to said railroad company, for the construction of a railroad; that said right of way was granted to said railroad company by Section 6 of said

Supreme Court of the United States.

THE ST. JOSEPH & DENVER CITY RAILROAD COMPANY, et al., Plaintiff in Error,

vs.

MATTHEW BALDWIN.

STATEMENT OF CASE.

The above named defendant in error, together with several other persons owning land in Jefferson County, Nebraska, made application to the Probate Court of said county, under Section 97 of Chapter 11 of the General Statutes of said State, for the appointment of commissioners to assess damages they claimed to have sustained on account of a strip taken by the said railroad company for a right of way over their said lands. Commissioners were appointed under that section, who finally reported to said court damages in favor of those uniting in said proceedings. From that assessment of damages the said railroad company appealed to the District Court of said Jefferson County, in which the several land-owners filed separate petitions. The petition of this defendant in error contained the usual averments in actions of this kind.

The answer therein set up specially, that the St. Joseph & Denver City Railroad Company was duly organized under the laws of the State of Kansas, in the year 1862, and that by an act of Congress, approved July 23, 1866, entitled "An act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph," the right of way 200 feet wide was granted to said railroad company, for the construction of a railroad; that said right of way was granted to said railroad company by Section 6 of said

act to the extent of 100 feet in width on each side of said road, where it may pass through the public domain; and said railroad company justified said entry complained of under said grant of the right of way so contained in said Section 6 of said act. (See transcript of record, pp 3-4.)

In the reply it was admitted that the said railroad company was duly organized under the laws of the State of Kansas. It was then alleged that said act of Congress of July 23, 1866, did not convey or grant to said railroad company any lands or right of way in the State of Nebraska; that the line of said railroad company was not located over the lands in question until the year 1871; that plaintiff was the owner of said lands at the time when said railroad company's line was located over the same, and prior thereto. (See transcipt of record, p 5).

At the November term, 1877, of said District Court, the said railroad company, defendant therein, filed a motion for judgment on the pleadings, on the ground that the said railroad company's organization being admitted, the sole question was as to the construction of said act of Congress, the said railroad company justifying under it, and alleging a grant of the right of way, and the reply simply denying that said act gave such a right. This motion being overruled by said court, said railroad company elected to stand on said motion, and judgment was then rendered assessing the damages at the sum of $200. From this judgment an appeal was perfected to the Supreme Court of the State of Nebraska, in which the judgment below was affirmed. (For the opinion of said Supreme Court see transcript of record, pp. 11-12-13). A writ of error was thereupon taken from this honorable court.

POINTS AND AUTHORITIES.

As reference must be made to perhaps all of the sections of the said act, the following is the act complete:

"An act for a grant of lands to the State of Kansas, to aid in the construction of the Northern Kansas Railroad and Telegraph:

"Be it enacted, by the Senate and House of Representatives of the United States of America, in Congress assembled, That there is hereby granted to the State of Kansas, for the use and benefit of the Saint Joseph & Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas, *to construct and operate a railroad from Elwood, in Kansas, westwardly, via Marysville, in the same State, so as to effect a junction with the Union Pacific Railrovd, or any branch thereof; not further west than the one hun-*

dredth meridian of west longitude, every alternate section of land designated by *odd* numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line of route of said road is definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections, or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached, as aforesaid, which lands, thus indicated by odd numbers and selected by direction of the Secretary of the Interior, as aforesaid, shall be held by the State of Kansas, for the use and purpose aforesaid; provided, that the land to be so selected shall in no case be located further than twenty miles from the line of said road; provided, further, that the lands hereby granted for and on account of said road shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as in this act hereinafter provided; provided, also, that no part of the land granted by this act shall be applied to aid in the construction of any railroad, or part thereof, for the construction of which any previous grant of land or bonds have been made by Congress; and, provided further, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are, hereby reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the route of said road through said lands, in which case the right of way for one hundred feet on each side of said road only shall be granted, subject to the approval of the President of the United States.

"SECTION 2. And be it further enacted, That the sections and parts of sections of land which, by such grant, shall remain to the United States within ten miles, one each side of said road, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price, as aforesaid; pro-

vided, that actual and *bona-fide* settlers under the provisions of the pre-emption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid; and provided, also, that settlers on any of said reserved sections, under the provisions of the homestead law, who improve, occupy and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SEC. 3. And be it further enacted, That the grant of lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use, and shall at all times be in readiness to transport troops, munitions of war, supplies and public stores upon its road, for the government, when required to do so by any department thereof, the government at all times having the preference in the use of the road, for all the purposes aforesaid, at fair and reasonable rates of compensation, not exceeding that paid by private individuals, or the average paid for like services on other roads; and the lands hereby granted, held and reserved as aforesaid, shall inure to the benefit of said company as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed, in a good, substantial and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land hereinbefore granted as lie opposite to and coterminous with the said completed sections; and when certificates of the Governor aforesaid shall be presented to said Secretary of the completion as aforesaid of each successive section of ten consecutive miles of said road, the said Secretary shall, in like manner, issue to said company patents for the said sections of said land as aforesaid for each of said sections of road until said road shall be completed; provided, that if said railroad company, or its assigns, shall fail to complete at least one section of said road each year, from the date of its acceptance of the grant provided for in this act, then its right to the lands for said section so failing of completion shall revert to the government of the United States; provided, further, that if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

"SEC. 4. And be it further enacted, That as soon as the said company shall file with the Secretary of the Interior maps of its line

designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

"SEC. 5. And be it further enacted, That the United States mail shall be transported on said road and its extension, under the direction of the postoffice department, at such price as Congress may by law provide; provided, that, until such price is fixed by law, the Postmaster General shall have power to fix the compensation.

"SEC. 6. And be it further enacted, That *the right of way through the public lands be, and the same is hereby granted to said Saint Joseph & Denver City Railroad Company, its successors and assigns, for the construction of a railroad, as proposed,* and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road, material for the construction thereof; said way is granted to said railroad to the extent of one hundred feet in width on each side of said road, *where it may pass through the public domain*; also, all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables and water stations.

"SEC. 7. And be it further enacted, That the acceptance of the terms, conditions and impositions of this act by the said Saint Joseph & Denver City Railroad Company shall be signified in writing, under the corporate seal of said company, duly executed, pursuant to the direction of its board of directors, first had and obtained, which acceptance shall be made within six months after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior."

Approved July 23, 1866. (Laws U. S., 1866, pp. 216-217-218).

Under the sixth section of the above act, had the Saint Joseph & Denver City Railroad Company the right of way over the lands of defendant in error, notwithstanding his title was anterior to the location of the line of the railroad?

Plaintiff in error insists that this question must be answered in the affirmative.

This question brings up for construction *only* the sixth section of said act. The right of way to the railroad company is granted *completely* by that section. It is the only subject matter of that section, and none of the other sections, as will be seen by reference, are connected by the slightest relations of context with it.

This grant is encumbered with no limitations, conditions or restrictions. It is not possible, in the construction of this section, to ob-

tain assistance from the other sections, for so completely does it stand isolated and disassociated from them, that the rule that in the construction of a statute you must take the whole of it into consideration, gives no aid to the judicial mind.

Plaintiff in error holds that the said grant of the right of way, as made by said Section 6, is operative in said railroad company's favor from July 23, 1866, the day said act was approved, and that the acquisition of all interests in land over which said road "*may pass*," and which *then* constituted a part of the "*public domain*," were subject to the right of way granted by said section; that this right or easement was created by this section, and thereafter rested as an incumbrance upon the *public domain* through and over which said road *might* pass.

Defendant in error, on the other hand, holds that the right of way given by said section did not attach in said railroad company's favor on the day said act was approved; that in the construction of this section, to gather its legal import, it is necessary to consult the previous sections of the act; that the same conditions, restrictions and limitations that qualify the grant of *land* as made in the first section of said act, also qualify the grant of the right of way made in the sixth section. In short, they claim that where land has been sold, homesteaded or preempted, prior to the actual location of the road, not only does the railroad company lose the land thus sold, homesteaded or preempted, as provided for in Section 1, but they lose also the *right of way* granted by Section 6. They insist that the road must be definitely fixed and located, and that the same conditions must be performed by the railroad company, that is necessary under said act, to vest the title of the land granted, in the company, before the right of way is available to the company.

Plaintiff in error claims that such a construction cannot be sustained.

I.

The words employed by said Section 6 are, "for and the same *is hereby* granted."

These are words of *present granting*, and import an *immediate* transfer of right or title.

Leavenworth, Lawrence & Galveston R. R. Company vs. United States, 92 U. S. 741.

Schulenberg et al. vs. Harriman, 21 Wall,, 44.

Railroad Company vs. Smith, 9 Wall., 95.

Allison vs. Halfacre, 11 Iowa, 450.

Clarkson vs. Buchanan, 53 Mo., 563.
1 Lester, 513.
8 Ohio, 257.
11 Ohio, 47.

II.

Unless, then, the grant of the right of way contained in this sixth section is qualified by the conditions and limitations which attach to the grant of land in the first section, the position of the defendant in error is not well founded, as the passage of the act ante-dates his title.

That there is no such qualification is apparent we maintain from the following considerations:

(*a.*) The conditions imposed by the first five sections qualify *only* the grant of *land* which is the subject matter of the first section.

(*b*) Section 3 of said act places several conditions upon the railroad company all of which must be performed before title to the consecutive ten mile sections is conveyed by patent to said company. Failing to perform these conditions the penalty is a reverting of the *land* of certain ten mile sections to the United States; and if the whole road is not completed within ten years from the grant, the penalty is a reverting of all the *lands* remaining unpatented to the United States.

Nowhere in the act is there any penalty or forfeiture imposed for conditions broken, which affects in the least the grant of the *right of way* given in the sixth section. Now if Congress had intended the same conditions to qualify the grant of the right of way as qualify the *land* grant in Section 1, a breach of those conditions would have been made to forfeit the rights under one grant as well as under the other. It will not do to say that the legal effect is the same—for Congress has *fixed* the penalty, and limiting it to the forfeiture of the *land* grant, by express mention, excludes all things not mentioned. Penalties and forfeitures are never enlarged by implication. The grant of the *right of way* in Section 6 might survive, then, to the company, while the benefits of the *land* grant of Section 1 might be lost. This consideration shows their absolute independence of each other.

(*c.*) The very necessities of the case demanded that the grant of the *right of way* in Section 6 should be instantaneous and immediate in its benefits. It was a necessary right to be *fully* enjoyed by the railroad company from the first. The act of granting it was therefore absolute and complete. It was not to be measured out in ten mile sections, like the benefits of the land grant; for the *last* as well as the first mile, the right of way was complete and perfect. The grant of

the right of way operated with full and instantaneous effect from the approval of the act.

(*d.*) The grantee in the *land* grant in the first section is "the State of Kansas," who receives the grant for the use and benefit of the St. Joseph & Denver City Railroad Company. But the sixth section makes the grant of the *right of way direct to the St. Joseph & Denver City Railroad Company.* We have here, then, in this act of Congress, virtually two distinct and separate grants, with different subject matters and different grantees. The subject matter of one is land; of the other, a right of way. In the one case the land is conveyed to a trustee who is limited and controlled by prescribed conditions. In the other, the thing granted being in the nature of a privilege, the grant is made direct to the recipient of the privilege. Now, by what rule of law can the conditions of one grant be made applicable to another when the subject matter is totally different, and when even the contracting parties are different?

(*e.*) There is no necessary connection between the two grants. Congress might have given the right of way as the full measure of its donation. It might have simply granted a right of way to said company where its road "*may* pass through the *public domain.*" Under well known principles of law this gives the grantee the right to locate. If, thereafter, with this easement existing and evidenced by a public grant one should purchase the fee from the government, he would do so with the risk of having a right of way located over his land. This clearly would be law as applicable to a transaction between individuals. Now, if the conditions which attach to the land grant do not qualify the grant of the right of way, (and we hold we have shown they do not,) then this case is practically the same as if the the right of way had been granted alone.

(*f.*) Congress in this act provided for the sales of land to continue up to the time when a map of the route should be filed with the Secretary of the Interior. But it thoughtfully provided against any loss to the railroad company by allowing equivalents to be elsewhere selected. But still a heavy loss would fall upon the railroad company if it had to pay for the right of way over such lands. In the same thoughtful manner, and to prevent its bounty from being burdensome, Congess in a separate section, with no conditions attached, granted absolutely and directly to the railroad company the right of way over the *then* public domain.

(*g.*) There are no conditions in Section 6 to the exercise of the right of way therein granted. The right is granted absolutely to said road over all lands "where it *may* pass through the public domain"—*may*

pass through, saying plainly, go where it will, or when it will, in the accomplishment of the purposes of the grant, the St. Joseph & Denver City Railroad Company shall have the right.

(*h.*) But we do not rely alone upon principle. *This very question* as to whether the *location* of the road is a condition upon the grant of the right of way given by the sixth section, has been once passed upon in a similar case, in which his honor, Judge Field, of this honorable Court, held that "the restrictions and exceptions found in the third section of the act, apply *only* to the grant of the *land* therein mentioned, and do not apply to the grant of the *right of way* made in the second section of that act, and *that all acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act in question were subject to the exercise of this right.*"

Central Pacific R. R. Co. vs. Dyer, 1 Sawyer, 641.

This question is also virtually passed upon in the case of Leavenworth, Lawrence & Galveston Railroad vs. United States, 92 U. S. 733.

The question there was whether the Osage ceded lands, so-called, passed from the United States by grant to said railroad company to aid in the construction of its road. At *the date of the grant*, the treaty with the Osages had not expired. At the *location of the line* of said railroad, the Osage title had been extinguished; the railroad company's position was that the grant to them did not operate upon any particular lands until *the line of its road was located*, and that, as at the date of such location the Osage treaty had terminated, *the location of the line* fastened the grant upon these Osage lands, and secured them for the company. The United States maintained that when the grant was made they had no right to grant these lands, as they were already *set apart* specifically from the public domain, and that as the grant employed words of *present granting*, it took effect at once, and did not await the actual *location* of the road before it became operative —and this Court so held.

In the case at the bar, the right of the St. Joseph & Denver City Railroad Company to pass over the public domain in the operation of its road, was "set apart" specifically on the 23d day of July, 1866. The fee could still be passed but it was subject to this right of way, as decided in 1 Sawyer, 641.

If, then, the grant of the right of way given by the sixth section stands alone, and not complicated by any of the conditions attached to the grant of land in the first section, the words of present granting in the sixth section must be taken in their natural sense as importing an

instantaneous transfer of right to the St. Joseph & Denver City Railroad Company.

Schulenberg et al. vs. Harriman, 21 Wall., 44.

Before leaving this branch of the case it may be well to say that much stress is laid by opposite counsel upon the words "as proposed," as employed in Section 6, as being sufficient to attach to the grant of the right of way, all the conditions that surround the grant of land in the first section.

We submit, however, that those words add nothing in a legal sense to the grant. They are at most mere words of reference. They could have been omitted and the legislative intent would have had the same scope. Putting them on adds nothing.

III.

But it may be contended that admitting we are right in the construction of this sixth section, it only goes, at the most, to the extent of giving the St. Joseph & Denver City Railroad Company the right of way over lands in the State of *Kansas*, but gives no such right in the State of *Nebraska*. They say, that by the act itself, as well as by the answer in the case, it appears that the St. Joseph & Denver City Railroad Company was organized under the laws of the State of Kansas, and that while it may enjoy all the benefits of the act in *that* State, it can take nothing thereunder in the State of Nebraska.

Their proposition of law is that a corporation, being a creature of statute, has no rights and possesses no powers except those conferred upon it by the sovereignty by which it is created, and can therefore take no rights and have no legal existence beyond the limits of the sovereignty creating it.

As a rule of law, this is undoubtedly correct; but *under the facts in this case*, it has no application.

The organization of the said railroad company, as set up in the answer, is *admitted* in the reply. The company was incorporated specially, under the laws of the then Territory of Kansas, in 1857, under the name of the Marysville or Palmetto & Roseport Railroad Company —that name being subsequently changed to the name it bears in this controversy—the nineteenth section of its incorporation, which is a public act, reads as follows:

SEC. 19. The operations of said company shall be confined to the general business of locating, constructing, managing and using said road, and the acts necessary or proper to carry the same into complete and successful operation, and for such purposes and no other.

Said company shall have power to extend their capital, receive loans, *grants and donations of land*, money or bonds, in any quantity, from this territory, *or from the United States*, and may sell, convey, pledge, mortgage or otherwise dispose of said lands or any part thereof, and apply the proceeds to the construction of said road and branches for the benefit of said road."

Laws of Kansas, 1857, p. 198, §19.

Now the proposition of law we hold as applicabte to this present question, under the powers given in the section quoted, is this: That in those States where there are no general statutes or settled policy restricting them in this respect, corporations of other States may purchase and hold lands as they desire, *provided their charters give them the competent power.*

Angell & Ames on Corporations, 8th Ed., §162, and cases cited.

Now, the charter of the railroad company, as shown by the section quoted, expressly gave the right to receive *grants and donations of land* from the *United States.* It will not do to say that the lands thus granted or donated might still be *within* the bounds of Kansas, for this section says, from *this territory* or from the United States, implying that any grant of lands by the United States would be of lands *outside* of the territory, as the grant *within* had already been provided for. This, then, brings us clearly within the rule cited as laid down by Angell & Ames.

But are we also with the *qualification* of that rule, viz: "Where there are no general statutes or settled policy restricting them in this respect?"

Now, not only do the statutes of Nebraska not inhibit or restrict in the slightest degree non-resident railroad companies from doing business or even building railroads within that State, but, on the contrary, *that State has, by express enactment, authorized railroad companies organized under the laws of Kansas, Missouri or Iowa to extend and build their roads into the State of Nebraska, and such roads are declared to have and possess all the powers, franchises and privileges as railroad companies incorporated under the laws of that State.* The statute giving this right reads as follows:

SEC. 1. That any railroad companies heretofore organized under the laws of the State of *Kansas*, Missouri or Iowa is hereby authorized *to extend and build its road into the State of Nebraska, and such railroad companies shall have and possess all the powers, franchises and privileges and be subject to the same liabilities of railroad companies or-*

ganized and incorporated under the laws of this State; provided, such non-resident company shall first file a true copy of its articles of incorporation with the Secretary of the State and shall comply with the laws of Nebraska as to filing and recording articles of incorporation and in all things required by law relating to railroads and otherwise in this State; and such non-resident railroad company shall keep an office in this State in some county in which its road is, or is proposed to be, and shall be liable to civil process, to be sued and to sue, as provided by law.

SEC. 2. This law shall take effect and be in force from and after its passage.

Approved February 12th, 1869.

Gen. Statutes of Nebraska, 1873, p. 203.

This invitation to foreign railroad companies stood on the statute book of Nebraska when the St. Joseph & Denver City Railroad Company built and located its road over the land of defendant in error; for he says in his reply that the said railroad was not constructed over his land until *1871*, and this statute was approved *February 12, 1869*, and went into effect at once.

The legislation of the State of Nebraska, then, has settled the policy of that State as friendly to foreign corporations, and as adopting them as its own.

Carroll vs. the City of East St. Louis, 67 Ill., 568.
Christian Union vs. Yount, 101 U. S., 352.

Further upon this point, the act of Congress itself gave the St. Joseph & Denver City Railroad Company, as implied in this grant of the right of way, the right to *go anywhere* in the *then public domain, to effect a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude*, and defendant in error admits in his reply that on the 23d day of July, 1866, (the date of said act) the lands in question "were the lands of the United States Government."

This contemplated junction with the Union Pacific system of roads could not be made without going into *Nebraska*, and hence the power to go there is implied.

The inhabitants of Springfield vs. the Conn. River Railroad Co., 4 Cush., 63-70-73.

City of Clioton vs. Cedar Rapids & Mo. R. R. R. Co., 24 Iowa, 455-479.

The railroad company's title to its right of way granted by the United States is as complete, therefore, over public lands which were in Nebraska, as in respect of public lands in Kansas.

But it is said by opposite counsel that plaintiff in error has not shown that it has complied with all the *conditions* imposed by the law of Nebraska upon foreign corporations coming into that State.

We answer, we are in Nebraska by the statutory permission of that State, and as long as the State suffers us to remain, no *private* person can complain—the *State* only can raise this question by quo warranto in a direct proceeding.

Cooley's Cons. Lim., 254.
Board of Comm. &c., vs. Shields et al., 62 Mo., 247.
Kayser vs. Trustees of Bremen, 16 Mo., 88.

The question as to whether the St. Joseph & Denver City Railroad can hold *lands* in Nebraska under its grant, has been decided in the affirmative in an appeal to the Secretary of the Interior from the decision of the Commissioner of the General Land Office, in the case of A. W. Nickell, vs. the St. Joseph & Denver City Railroad Company, and the question as to whether said company can enjoy its grant of the *right of way* in that State, rests upon the same principles.

IV.

Upon the point made by defendant in error that the said railroad company's right to the right of way did not accrue until it had filed with the Secretary of the Interior a map of its line, designating and fixing the location of its route, the case of Western Pacific Railroad Company vs. Tevis, 41 Cal., 489 will be strongly relied upon. They cite this case in support of the position assumed in the case at bar, that the same conditions, restrictions and limitations which qualify the *land* grant, also qualify the grant of the *right of way*. The only answer we deem it necessary to make to this case is, that the act of Congress, then under consideration, was the one approved July 1, 1862, which granted to the Union Pacific Railroad Company and to the *Central Pacific Railroad Company, of California*, lands and the right of way to build their railroads, and that this *same act of Congress* was the one which received the clear and able construction of Mr. Justice Field, in 1 Sawyer, 641, heretofore cited by us, and in which he holds that "the restrictions and exceptions found in the third section of the act apply *only* to the grant of *land* therein

mentioned, and *do not* apply to the grant of the *right of way* made in the second section of that act, and that all acquisitions of land over which this right of way was thus granted made subsequent to the *passage of the act* in question, were subject to the exercise of this right.

It may be sufficient to say, generally, of the other case cited and relied upon by defendant in error, that none of them present the *exact point* now to be determined, and that the only case where this *precise* question has been raised and determined, which we have been able to find, is the case in 1 Sawyer, 641, herein cited.

DONIPHAN & REED,
Attorneys for Plaintiff in Error.
WITH JOHN F. DILLON,
Of Counsel.

mentioned, and *do not* apply to the grant of the *right of way* made in the second section of that act, and that all acquisitions of land over which this right of way was thus granted made subsequent to the *passage of the act* in question, were subject to the exercise of this right.

It may be sufficient to say, generally, of the other case cited and relied upon by defendant in error, that none of them present the *exact point* now to be determined, and that the only case where this *precise* question has been raised and determined, which we have been able to find, is the case in 1 Sawyer, 641, herein cited.

DONIPHAN & REED,
Attorneys for Plaintiff in Error.
WITH JOHN F. DILLON,
Of Counsel.

SUPREME COURT U.S.
FILED
FEB 14 1891
JAMES H. McKENNEY, Clerk

IN THE

UNITED STATES

SUPREME COURT

THE ST. JOSEPH & GRAND ISLAND
RAILROAD COMPANY,
BOND RECEIVERS,

Appellants,

vs.

MATHEW F. BALDWIN,

Defendant.

BRIEF FOR DEFENDANT IN ERROR.

IN THE

UNITED STATES

SUPREME COURT

THE ST. JOSEPH & DENVER CITY RAILROAD COMPANY, WILLIAM BOND RECEIVER,
Plaintiff in Error.
vs.
MATHEW F. BALDWIN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This action was brought by the defendant in error, to recover of the plaintiff in error, the amount of damages alleged to have been sustained by him, by reason of the railroad company having unlawfully entered upon his premises and constructed its railway across his farm, and appropriating the right of way to its own use.

The petition in the State District Court, is in the usual form in actions of this character.

The answer consists of two alleged defenses: The first is in effect a general denial.

The second defense sets out that the railroad company is a corporation duly organized under the laws of Kansas, in the year 1862. That in 1866 congress passed an act granting to the company the right of way across the public lands to build a railroad from Elwood, in the state of Kansas, westwardly by way of Marysville, in the same state, so as to effect a junction with the Union Pacific railroad or any branch thereof, not further west than the one hundredth meredian, West longitude. The grant was accepted and the road located on its present route, and maps of the same filed in the general land office of the United States, about January 1st, 1867. That at the date of the passage of the act, the land described in the petition was vacant land belonging to the United States and was subject to the grant of the right of way, and that the defendant in error took the land subject to the right of way granted to the company. The answer also sets up that the railroad company had mortgaged its roadbed and right of way on or about the 14th day of May, 1870.

To this answer the defendant in error filed a reply admitting that the company was a corporation organized under the laws of Kansas in 1862. That on the 23d day of July 1866, (the date of the passage of the act of Congress,) the lands mentioned in the petition were government lands and that the railroad company mortgaged the right of way and roadbed, as alleged in the answer, and denied each and every allegation in the answer not specifically admitted.

The attorney for the railroad company moved for judgment on the pleadings, which motion after a full argument the court overruled, to which ruling the Company excepted and took the case to the Supreme Court of the State, by petition in error, where the judgment of the district court was affirmed.

St. Joe and Denver R. R. Co. vs. Baldwin, 7 Neb., 247.

From the judgment of the Supreme Court, of the State of Nebraska, the defendant in error appeals to this court.

The only facts alleged in the answer and admitted in the reply, are,

1st. That the defendant Company is a corporation, and was duly organized under the laws of Kansas, in 1862.

2d. That the lands described in the petition were government lands at the time of the passage of the act of Congress in 1866, making the grant.

3d. That the lands and road bed were mortgaged by the company as alleged in the answer. It is not claimed, however, that this fact is at all significant.

All the other allegations are denied in the reply.

A portion of the first section of the act of congress referred to in the answer is as follows:

"That there is hereby granted to the State of Kansas for the use "and benefit of the Saint Joseph and Denver City Railroad "Company, the same being a corporation organized under the "laws of the state of Kansas, to construct and operate a rail-"road from Elwood, in Kansas, westwardly via Maryville in the "same state, so as to effect a junction with the Union Pacific "railroad or any branch thereof, not further west than the one "hundredth meredian of West longitude, every alternate sec-"tion of land designated by odd numbers, for ten sections in "width, on each side of said road to the point of intersetion. "But in case it shall appear that the United States have, "*when the line or route of said road is definitely fixed*, sold "any section or any part thereof, granted as aforesaid, or "that the right of pre-emption or homestead settlement has at-"tached to the same or that the same has been reserved by the "United States for any purpose whatever, then it shall be the "duty of the Secretary of the Interior to cause to be selected "for the purpose aforesaid, from the public lands of the United "States, nearest to tiers of sections above specified, so much

"land in alternate sections or parts of sections designated by "odd numbers, as shall be equal to such lands as the United "States have sold, reserved or otherwise appropriated, or to "which the rights of pre-emption or homestead settlements have "attached as aforesaid."

The balance of section one contains several conditions, restrictions and limitations on the grant. Section two provides that the even numbered sections within the limits of the grant shall be double minimun lands. Section three provides that after the construction of the road, the company shall keep it in repair and shall transport troops and munitions of war for the government upon being paid for it; and also what proof shall be made, and on what conditions the company shall be entitled to their patents for the lands.

Section four provides "That as soon as said company shall file with "the secretary of the interior maps of its lines designating the "route thereof, it shall be the duty of the said secretary to "withdraw from the market the lands granted by this act, in "such manner as may be best calculated to effect the purposes "of this act, and subserve the public interest."

Section five provides that the United States mail shall be transported on said road at such price as congress might by law provide. Then comes section six, which is as follows:

"The right of way through the public lands be, and the same is "hereby granted to said Saint Joseph and Denver City railroad "company, its successors and assigns, for the construction of a "railroad as proposed; and the right is hereby given to said "corporation to take from the public lands adjacent to the line "of said road material for the construction thereof. Said way "is granted to said railroad to the extent of one hundred feet "in width on each side of said road where it may pass through "the public domain, also all necessary ground for station build "ings, work shops, depots, machine shops, switches, side tracks, "turn tables and water stations."

In October 1869, and before the line or route of the road was in

any manner 'definently fixed,' the defendant in error became the owner of the land in question. It was also long before the company filed with the Secretary of the Interior maps of its lines. In October, 1871, the railroad company entered upon the lands in question, which it is admitted were then owned by and in the possession and occupation of the defendant in error, and constructed their road, and since that time the company have continued to use and occupy the right of way across the said premises.

The company claims the right of way across the premises in controversy, by virtue of section six above refered to.

It is insisted on the part of the defendant in error

1st. That the grant under section six took effect only from the date of the filing of the maps designating the route thereof with the Secretary of the Interior, or until the company had in some manner definitly fixed the line or location of its road, and

2d. That the grant could have no effect in the state of Nebraska, until after the company had complied with the terms and conditions imposed by the laws of the state of Nebraska allowing foreign corporations to extend their lines of road into the state of Nebraska.

I.

Section six must be construed together with the other provisions of the act, and the restrictions and conditions placed upon the grant contained in section one apply also to this section. If this be so it will be admitted that the grant did not take effect until the line of the road was definitely fixed. It will doubtless be strenuously insisted that the grant of the right of way is a separate and independent grant, and that section six is to be construed as if it stood alone; that the land grant is to the state of Kansas, while the grant of the right of way is directly to the company. But this position is not tenable. True the grant of the right of way is directly to the company, "for the construction of a railroad as proposed." As proposed where? Is it not "as proposed" in the preceding sections of the act? Can it

be doubted that the words "as proposed" refer to the location of the road as defined in section one. The Supreme Court of Alabama held that the act of Congress of Aug. 4, 1852, which grants to railroad companies the right of way over the public lands, in the states where such lands lie, ceases to operate on said lands after they have been entered by a citizen; unless the railroad company claiming the right of way, has located its roadway and filed a plat of the location of the same with the commissioner of the general land office of the United States at Washington in the manner required by said act of congress before said entry was made.

Alabama and Florida R. R. Co. vs. Burkett, 46 Ala., 369.

Again the Supreme Court of California says: "The right of way over the public lands of the United States, *became perfect upon the filing of the plat of the location of the railroad in the proper land office.*

W. P. R. R. Co. vs. Tevis, 41 Cal., 489, 402, 492.
Northern R. R. Co. vs. Gould, 21 Cal., 255.
Lacy's Digest of R. R. Decisions 255, Secs. 808, 809, 810.

II.

This grant of right of way, under which the company seeks to justify, was made to a Kansas corporation, created under and by virtue of the laws of Kansas, and we insist can have no force outside of the boundaries of the state which created it. A corporation is a mere creature or creation of the statute. It has no rights and possesses no powers except those conferred upon it by the sovereignty by which it is created, therefore, it can have no legal existence out of the boundaries of the sovereignty by which it is created.

It exists only in contemplation of law and by force of law, and where the law ceases to operate and is no longer obligatory the corporation can have no existence.

Bank of Augusta vs. Earl, 13 Pet., 519.
Runyan vs. Lessee of Costor, 14 Pet., 122.
1 Redfield on the Law of Railways, 56 and 57.

The legal entity of a person which exists by force of law, can have no legal existence beyond the limits of the state sovereignty which brings it into life and endues it with its faculties and powers.

Ohio and Miss. R. R. Co., vs. Wheeler, 1 Black, 286.

A corporation has no absolute right of recognition in another state. Depending for its recognition upon the assent of the state which it seeks to enter, it follows as a matter of course that such assent may be granted upon such terms and conditions as the state may think proper to impose.

Paul vs. Virginia, 8 Wall, 181.
Ducat vs. Chicago, 10 Wall, 410.
The LaFayette Ins. Co. vs. French, 18 How, 407.
Western Un. Tel. Co. vs. Mayor, &c., 28 O., St. 521–526.

From these authorities it follows that the only way in which the St. Joseph and Denver City Railroad Company could exercise any of its corporate powers in the state of Nebraska was to take the necessary steps, and become a body corporate under and by virtue of the laws of this State, or at least to take such steps as the laws of that state require non-

resident railroad companies to take before they can exercise corporate privileges within this state. As to what steps the Statutes of Nebraska require foreign Railroad Companies to take to entitle them to exercise corporate privileges within its borders. See.

General Statutes of Nebraska. 203.

A grant of land made by Congress to one State will not extend into another State without express language in the act to that effect, or in the language of attorney general Cushing, "Without language of enactment "to that express effect, it cannot be inferred from other words of enact- "ment that a grant of land to one state extends into another state."

The DesMoines Improvement, 7 Op. Att'y. Gen. 704 to 706.

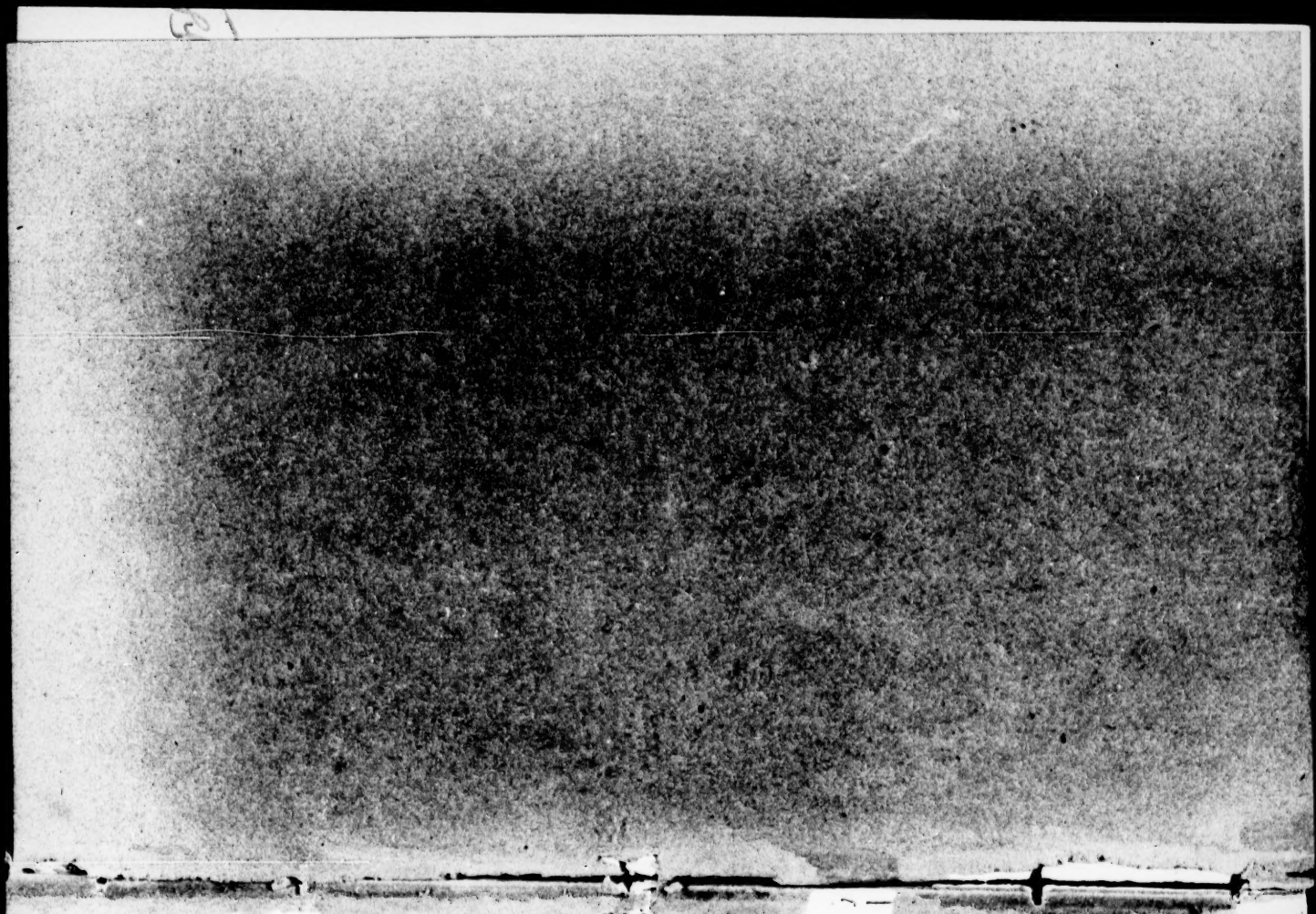
All grants of this description are strictly construed against the grantees.

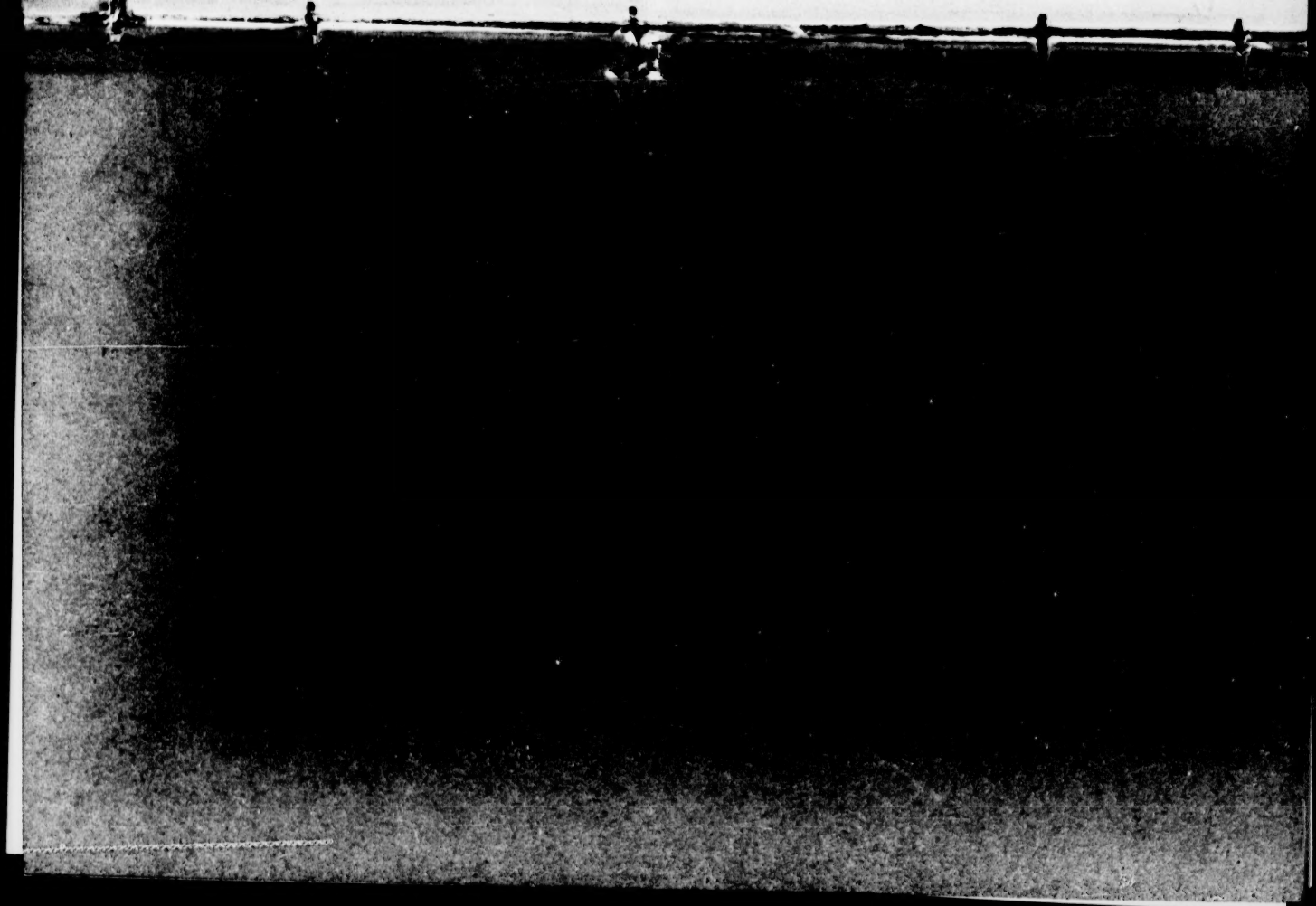
Leavenworth &c., R. R. Co. vs. U. S., 2 Otto, 733.
The Dubuque &c., R. R Co. vs. Litchfield, 23 How, 66.

This being a grant of the right of way to a railroad corporation which can only build its road within the limits of the state of Kansas, Congress could not have intended to extend the grant where the road itself could have no legal existence.

We think the judgment of the Supreme Court of the State of Nebraska is correct, and should be affirmed.

E. E. BROWN.
Plaintiffs Attorney.





TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 260.

HENRY G. FISK, THOMAS R. CLARK, AND THOMAS J. FLAGG, PLAINTIFFS IN ERROR,

vs.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 12, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 260.

HENRY G. FISK, THOMAS R. CLARK, AND THOMAS J. FLAGG, PLAINTIFFS IN ERROR,

vs.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Henry G. Fisk, Thomas R. Clark, and Thomas J. Flagg, plaintiffs, and Chester A. Arthur, defendant, a manifest error hath happened, to the great damage of the said plaintiffs as by their complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday in October, eighteen hundred and seventy-eight, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 5th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

The foregoing writ is hereby allowed.
Dated N. Y., Oct. 5, 1878.

SAM'L BLATCHFORD.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-three inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Henry G. Fisk, Thomas R. Clark, and Thomas J. Flagg, plaintiffs in error, against Chester A. Arthur, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

JOHN I. DAVENPORT,
Clerk.

(Indorsed:) U. S. Supreme Court. Henry G. Fisk et al., plaintiffs in error, against Chester A. Arthur, defendant in error. Original writ of error. Stanley, Brown & Clarke, att'ys for pl'ffs in error, 195 B'way.

Due service of a copy of the within is hereby admitted.
N. Y., Oct. 7, 1878.

S. L. WOODFORD,
U. S. Att'y.

U. S. circuit court. Filed Oct. 7, 1878.

JOHN I. DAVENPORT,
Clerk.

3 *Summons for relief.*

Superior court of the city of New York.

HENRY G. FISK, THOMAS R. CLARK AND THOMAS J. FLAGG, plaintiffs,
against
CHESTER A. ARTHUR, DEFENDANT.
} Com. not ser.

To the defendant above named:

You are hereby summoned and required to answer the complaint in this action which will be filed in the office of the clerk of the superior court of the city of New York, at the court house in said city, and to serve a copy of your answer to the said complaint on the subscribers at their office No. 16 Wall street, New York City, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated N. Y., October 13, 1873.

STANLEY, BROWN & CLARKE,
Plaintiffs' Attorneys.

4 (Endorsed:) No. 2. 2657. N. Y. superior court. Henry G. Fisk et al. vs. Chester A. Arthur. Summons. Stanley, Brown & Clarke, pl'ffs' att'ys, 16 Wall st., N. Y. Received Oct. 17, 1873, U. S. attorney's office. Rec'd Oct. 13, 1873.

5 The President of the United States of America to the judge of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Chester A. Arthur, defendant, by Henry G. Fisk et al., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 17th day of Nov., 1873, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Nathan Clifford, esq., associate justice of the Supreme Court of the United States, the 11th day of November, in the year one
6 thousand eight hundred and seventy three.

[L. S.] KENNETH G. WHITE,
Clerk.

GEORGE BLISS,
Defendant's Attorney.

(Endorsed:) 2657. U. S. circuit court. Chester A. Arthur ads. Henry G. Fisk et al. Copy certiorari. George Bliss, defendant's attorney.

SIR: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, Nov. 11th, 1873.

Yours, &c.,

GEORGE BLISS,
Defendant's Attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, Nov. 11th, 1873.

STANLEY, BROWN & CLARKE,
Plaintiffs' Attorneys.

7 THE UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of New York, in the second circuit, of the October term, in the year one thousand eight hundred and seventy-three.

HENRY G. FISK ET AL.
vs
CHESTER A. ARTHUR. } No. 2.

Henry G. Fisk, Thomas R. Clark, and Thomas J. Flagg, copartners, under the firm name of Fisk, Clark & Flagg, plaintiffs in this suit, come into court, and, by Stanley, Brown & Clarke, their attorneys, give the court now here to be informed that heretofore, to wit, on the 13th day of October last past, this action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court, in favor of the said plaintiffs against the defendant herein upon the causes of action hereinafter set forth, and the summons therein filed with the clerk of said court; that the defendant afterwards, by his attorney, Geo. Bliss, esq., duly appeared in said action; and thereupon, on the 17th day of November, in the year one thousand eight hundred and seventy-three, the said
8 action was duly removed by writ of certiorari for further prosecution into this court, according to the act of Congress in such case made and provided, and the clerk of the said court did thereupon return the said writ with the said summons, and duly file the same in this court, which allegations the defendant admits to be true; wherefore, let the further proceedings and trial in this action be continued in this court.

And the said plaintiffs, by their said attorneys, complain of said defendant of a plea of trespass on the case for promises; for that whereas said defendant, on 13th day of October, eighteen hundred and seventy-three, at New York City, in the district aforesaid, was indebted to said plaintiffs in the sum of one thousand dollars, lawful money of the United States of America, for duties on merchandise, to wit, suspender web and linen and cotton shirtings, imported into and entered at the collection district of the United States for the city of New York on or about the 1st day of January, 1873, and on divers other days thereafter, and until July 1st, in the year one thousand eight hundred and seventy-three, in the following vessels, to wit: Ville de Paris and Washington,

from Havre; City of Limerick, City of Paris, City of Baltimore,
9 City of Bristol, and City of Montreal, from Glasgow, unlawfully demanded, exacted, and received at said New York City by the said defendant, then collector of the customs for said district, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest and appeal in writing in due form of law. And, being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money when he, said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of one thousand dollars lawful money of the United States of America, for money before that time lent and advanced by said plaintiffs to said defendant, and at the special instance and request of the said defendant. And for other money by the said plaintiffs before that time paid, laid out, & expended for the said defendant and at the like request of the said defendant. And for
10 other money by the said defendant, before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when he should be thereunto afterwards requested.

Nevertheless, said defendant (although often afterwards requested so to do) has not paid said sums of money or any or either of them, or any part thereof, to the said plaintiffs but to pay the same or any part thereof to the said plaintiffs, has hitherto refused, and still does refuse, to the damage of the said plaintiffs of one thousand dollars, and therefore the said plaintiffs bring suit, &c.

STANLEY, BROWN & CLARKE,
Attorneys for the Plaintiffs.

(Endorsed:) 2657. U. S. circuit court. H. G. Fisk et al. vs. Chester A. Arthur. Declaration. To Geo. Bliss, esq., def't's att'y.

11 SIR: Please take notice, that a rule has been entered in the book of common rules, in the office of the clerk of this court, at the city of New York, requiring the defendant to plead to the declaration in twenty days after service of a copy thereof and notice of said rule on his attorney, or judgment, &c.

New York, , 187 .

STANLEY, BROWN & CLARKE,
Attorneys for Plaintiffs, 16 *Wall Street.*

Due service of a copy of within declaration and above notice is hereby admitted this 23rd day of December, 1873.

GEO. BLISS,
Def't's Att'y.

Received Dec. 23, 1873. U. S. attorney's office.

12 *Bill of particulars.*

Superior Court, city of New York.

HENRY G. FISK ET AL.
against
CHESTER A. ARTHUR, COLLECTOR OF THE CUSTOMS of the United States at the port of New York. } No. 2.

SIR: Please to take notice that the following is the bill of particulars of items of the plaintiffs' demand in the above entitled action, to wit, moneys exacted by compulsion and duress, and under color of the revenue laws of the United States, by the defendant as collector as aforesaid, from and paid by the plaintiffs on merchandise imported by the plaintiffs as per schedule hereto annexed, with legal interest on said amount from the date of payment thereof as aforesaid.

Dated New York, Nov. 17, 1873.

Yours, &c.,

STANLEY, BROWN & CLARKE,
Plaintiffs' Attorneys, No. 16 Wall Street, New York.

To GEO. BLISS, Esq.,
Defendant's Attorney.

13 SCHEDULE.

[Importers. Fisk, Clark & Flagg.]

Description of merchandise.	Place from whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty paid in excess
C F 1,281 suspender web	Havre.....	Ville de Paris ..	Febr. 7, 1873	March 15, 1873	4 59
" 1,268 " "	"	Washington.....	Jan. 16, "	Feb. 10, "	13 95
" 3096-3100 linen & cotton shirtings.....	Glasgow ..	City of Limerick	May 10, "	May 26, "	87 55
" 3101-3104.. do	" ..	" Paris	" 20, "	June 4, "	89 17
" 3105-3107.. do	" ..	" " Baltimore	" 24, "	" 7, "	32 39
" 3108-3110.. do	" ..	" " Bris ol ...	" 30, "	" 16, "	31 38
" 3052-3055.. do	" ..	" " Montr'al.	Feb. 4, "	Feb. 17, "	115 87

Description of merchandise.	Date of payment of duty.	Date of filing protest.	Date of appeal to the Secretary of the Treasury.	Date of answer of the Secretary of the Treasury.
C F 1,281 suspender web.....	April 25, 1873	April 19, 1873	April 28, 1873	None.
" 1,268 " "	May 26, "	May 23, "	May 29, "	"
" 3096-3100 linen & cotton shirtings..	" "	June 17, "	July 2, "	"
" 3101-3104 do ..	June 4, "	" " "	" " "	"
" 3105-3107 do ..	" 27, "	" " "	" " "	July 21, 1873
" 3108-3110 do ..	July 2, "	" " "	" " "	" "
" 3052-3055 do ..	May 8, "	" 11, "	" " "	None.

(Endorsed:) 2657. N. Y. superior court. Henry G. Fisk et al. against Chester A. Arthur, collector of the customs of the United States at the port of New York. Bill of particulars. Stanley, Brown & Clarke, attorneys for plaintiff, No. 16 Wall street, N. Y. Geo. Bliss, esq. Received Nov. 17, 1873, U. S. attorney's office.

14 *Plea.*

United States circuit court sou'hern district of New York.

CHESTER A. ARTHUR }
ads.
HENRY G. FISK & AL. }

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

GEO. BLISS,
Defendant's Attorney.

To STANLEY, BROWN & CLARKE, Esq.,
Plaintiffs' Attorney.

(Endorsed:) 2657. U. S. circuit court. C. A. Arthur ads. Henry G. Fisk & al. Plea. Geo. Bliss, attorney for defendant.

Due service of a copy of within is hereby admitted. New York, Jan. 6, 1874. Stanley, Brown & Clarke, per M. & B. You will
15 please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.

New York, Jan. 6, 1874.
Yours, &c.,

GEO. BLISS,
Defendants' Attorney.

To STANLEY, BROWN & CLARKE, Esq.,
Plaintiffs' Attorney.

16 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Wednesday, the twelfth day of January, in the year of our Lord one thousand eight hundred and seventy-six.

Present, the honorable Judge Shipman, circuit judge.

HENRY G. FISK ET AL. }
vs.
CHESTER A. ARTHUR. }

On motion of Stanley, Clarke & Brown, ordered trial.

Jurors sworn: Walter K. Marvin, Elisha Davis, George T. Jackson, Henry A. Smith, George F. Leggett, James Hutchinson, Thomas F. Davison, Alonzo E. Austin, Harmon Wagner, Jacob Ullman, George F. Smith, Lawrence M. Van Bout.

Mr. Stephen G. Clark opens the case on the part of the plaintiff.

Evidence for plaintiff.

Thomas R. Clark sworn.

17 By direction of the court the jury say that they find a verdict for the defendant, and so they say all.

Ordered that pl'ffs have 30 days in which to make and prepare a case.

18 *Judgment.*

United States circuit court southern district of New York.

HENRY G. FISK ET AL.
vs.
C. A. ARTHUR.

The issues in this action having been brought on for trial before Mr. Judge Shipman and a jury, at a circuit court of the October term, 1875, and the issues having been tried, and a verdict for the defendant having been duly rendered on the twelfth day of January, 1876, and his costs having been adjusted at $50.47-100:

Now, on motion of Stewart L. Woodford, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $50.47-100, his taxed costs, and have execution therefor.

Judgment signed this 15 day of Feb'y, 1878.

J. M. DEWEL,
Dep. Clerk.

19 (Indorsed:) 2657. United States circuit court. Henry G. Fisk et al. vs. C. A. Arthur. Judgment roll. Stewart L. Woodford, United States attorney for defendant. Filed , 187 . Costs, $50.47-100. U. S. circuit court. Filed Feb. 14, 1878. John I. Davenport, clerk.

20 *Engrossed bill of exceptions.*

Circuit court of the United States for the southern district of New York.
In the second circuit.

HENRY G. FISK, THOMAS R. CLARK, AND Thomas I. Flagg
vs.
CHESTER A. ARTHUR.

Afterwards, to wit, on the 12th day of January, 1876, at a stated term of this court, begun and holden at the city of New York, to wit, on the third Monday of October, 1875, before the honorable Nathaniel Shipman, district judge of the United States for the State of Connecticut, appointed to hold the said circuit court according to the form of the statute in such case made and provided, the aforesaid issue so joined as between the said parties as aforesaid, as by the record more fully appears, came on to be tried by a jury duly empanelled and sworn for that purpose, the said plaintiffs being represented by Stephen G. Clarke, esq., and the said defendant by George Bliss, esqr., and in the course of the trial the said counsel for the plaintiffs did take and allege

21 sundry exceptions to the rulings and charge of the court, and to

the refusals of the court to give certain instructions to the jury as then and there prayed for by them, which said exceptions are hereinafter severally set forth.

To maintain the said issue on the part of the plaintiffs, counsel for the said plaintiffs offered evidence tending to show that in May and June, 1873, the plaintiffs made several importations of shirtings, composed of linen and cotton, upon which the defendant as collector of customs assessed and plaintiffs paid a duty at ninety per cent. of the sum of 5½ cents per square yard & twenty per cent. ad valorem, which duty amounted to more than thirty-five per cent. ad valorem, and against the payment of which duty the plaintiffs duly protested in writing as follows: The part of the protest which is material to the present case is as follows:

NEW YORK, *June 17th*, 1873.

To CHESTER A. ARTHUR,
Collector of Customs Port of New York:

22 SIR: We do hereby give you notice pursuant to the requirement of the 14th section of the act entitled "An act to increase duties on imports and for other purposes," approved 30th June, 1864, of dissatisfaction at your decision and liquidation on or about the of our entry, per city of Baltimore from Glasgow, made in your office on or about the 7th day of June, 1873, for Madras & Cheviot shirtings, composed of mixed materials, cotton and flax.

The ground of our dissatisfaction, objection, and protest, both against any and every payment which we have made or may hereafter be required to make, or may make thereunder, is, that the merchandise aforesaid is only liable under existing laws to a duty of 35 per centum ad valorem less 10 per centum, under section 22 of the act of March 2, 1861, and section 13 of the act of July 14, 1862, and section 2 of the act of July 6th, 1872.

The plaintiffs also appealed to the Secretary of the Treasury in due form and time, and likewise brought this action in due time.

23 The testimony produced by plaintiffs as to the description of the goods in said several importations in question was by one witness. His testimony was substantially to the following effect: These goods are made of linen and cotton, and have been imported for several years. They are manufactured shirtings not made up; cotton is the material of chief value; it largely predominated. In this particular invoice the goods were colored.

It was conceded by counsel for plaintiffs that the goods exceeded two hundred threads to the square inch, counting the warp and filling. Ten per cent. reduction was allowed upon all the goods in question. The difference between the duty claimed of thirty-five per cent. less ten per cent., and the duty actually assessed at the rate of five and one-half cents a square yard and twenty per cent. ad valorem, less ten per cent., is $32.39.

The defendant offered no testimony, whereupon the testimony on both sides being closed, the plaintiffs moved the court to direct the jury to find a verdict for the plaintiffs, which motion was denied; and the counsel for the plaintiffs duly excepted, and thereupon, there being no

24 question of fact in the case, the court instructed the jury that the plaintiffs were not entitled to recover, on the ground that the goods in question were dutiable at the rate at which they were assessed under section 1 of the act of Congress entitled "An act amendatory of certain acts imposing duties upon foreign importations," approved March

3rd, 1865. To which ruling and direction counsel for plaintiffs duly excepted.

The jury thereupon returned a verdict for the defendant by direction of the court. And because none of the said exceptions so offered and made to the opinion, instructions, and decisions of the court do appear upon the record of the said trial, therefore, on the prayer of the said plaintiffs, by their counsel, the said judge has to this bill of exceptions put his seal nunc pro tunc as of the 12th day of January, 1876.

N. SHIPMAN, [L. S.]
Judge.

25 (Endorsed:) No. 2. Circuit court of the U. S. for the so. dist. of N. Y., 2nd circuit. 2657. Henry G. Fisk and o'rs, plaintiffs, against Chester A. Arthur, defendant. Engrossed bill of exceptions. Stanley, Brown & Clarke, attorneys for plaintiffs, 16 Wall street, New York. Filed Oct. 13, 1876.

26 Supreme Court of the United States, of October term, in the year of our Lord one thousand eight hundred and seventy-eight.

HENRY G. FISK, THOMAS R. CLARK, AND THOMAS J. Flagg
vs.
CHESTER A. ARTHUR.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, come the said Henry G. Fisk, Thomas R. Clark and Thomas J. Flagg, by Stephen G. Clarke, esq., their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that there was error in the refusal of the court to direct a verdict for the plaintiffs in error as therein prayed for, and in the direction of the court to the jury that the defendant was entitled to a verdict; also in that judgment was given for the defendant in error against the plaintiffs in error, whereas by the law of the
27 land judgment ought to have been given for the said plaintiffs in error against said defendant in error. And the said plaintiffs pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

STEPHEN G. CLARKE,
Att'y for Pl'ffs in Error.

(Endorsed:) 2657. Supreme Court of the United States. Henry G Fisk et al. vs. Chester A. Arthur. Assignment of errors. Stephen G. Clarke, att'y for pl'ffs in error, 195 Broadway.

Due service of a copy of the within is hereby admitted.
N. Y., Oct. 10, 1878.

STEWART L. WOODFORD,
U. S. Attorney, Attorney for Deft., &c.

28 Supreme Court of the United States.

HENRY G. FISK, THOS. R. CLARKE, & THOMAS J. Flagg, plaintiffs in error,
s.
CHESTER A. ARTHUR, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, 1878, the

said Chester A. Arthur, defendant in error, by Stewart L. Woodford, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid. And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the records and proceedings aforesaid as the matter aforesaid above assigned for error, and that the judgment aforesaid, in form afore-
29 said given, may be in all things affirmed, &c.

STEWART L. WOODFORD.
Attorney for Defendant in Error.

(Endorsed:) Supreme Court of the United States. Henry G. Fisk et al., pl'ffs in error, vs. C. A. Arthur, deft. in error. Joinder in error. Stewart L. Woodford, U. S. attorney, att'y for deft.

Service of a copy of the within joinder in error is hereby admitted. New York, Oct. 10, 1878.

STEPHEN G. CLARKE.
Att'y for Pl'ffs in Error.

U. S. circuit court. Fled Oct. 10, 1878.
JOHN I. DAVENPORT, *Clerk.*

30 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

HENRY G. FISK, THOMAS R. CLARK, & THOMAS J. Flagg
vs.
CHESTER A. ARTHUR.

Know all men by these presents that we, John A. Bagley, of No. 45 East 28th street, in the city of New York, and Melvin Brown, of No. 96 Waverly ave., Brooklyn, N. Y., and held and firmly bound unto the above named Chester A. Arthur in the sum of two hundred & fifty dollars, to be paid to the said Chester A. Arthur for the payment of which well and truly to be made we bind ourselves, and each us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents, sealed with our seals, and dated the first day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas, the above named plaintiffs have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named plaintiff, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN A. BAGLEY. [L. S.]
MELVIN BROWN. [L. S.]

Sealed and delivered, and taken and acknowledged, this 1st day of October, 1878, before me.

C. W. BENNETT,
Notary Public, N. Y. Co.

31 UNITED STATES OF AMERICA,
Southern District of New York, ss:

John A. Bagley and Melvin Brown, severally being duly sworn, each deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JOHN A. BAGLEY.
MELVIN BROWN.

Sworn to this 1st day of October, A. D. 1878, before me.

C. W. BENNETT,
Notary Public, N. Y. Co.

(Indorsed:) Vol. page . U. S. circuit court. Henry G. Fisk et al. vs. Chester A. Arthur. Bond for damages, costs on writ of error. Stanley, Brown & Clarke, pl'ff's att'ys, 195 Broadway.

Approved Oct. 5, 1878.

JOHN I. DAVENPORT,
Clerk.

Filed this day of , 18 .
U. S. circuit court. Filed Oct. 5, 1878.

JOHN I. DAVENPORT,
Clerk.

32 UNITED STATES OF AMERICA, *ss:*

To Chester A. Arthur, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Henry G. Fisk, Thomas R. Clark, and Thomas J. Flagg are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, October 5th, 1878.

SAM'L BLATCHFORD.

33 (Indorsed:) 2657. U. S. Supreme court. Henry G. Fisk et al., plaintiffs in error, against Chester A. Arthur, defendant in error. Orig'l citation. Stanley, Brown & Clarke, att'ys for pl'ffs in error, 195 B'way.

Due service of a copy of the within is hereby admitted.
N. Y., Oct. 7, 1878.

S. L. WOODFORD.
U. S. Att'y.

U. S. circuit court. Filed Oct. 17, 1878.

JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 260. Henry G. Fisk, Thomas R. Clark & Thomas J. Flagg, plaintiffs in error vs. Chester A. Arthur, collector of the port of New York. S. New York, C. C. U. S. Filed 12th October, 1878.